

Regulatory Institutions Network

APPLICATIONS OF RESPONSIVE REGULATORY THEORY IN AUSTRALIA AND OVERSEAS

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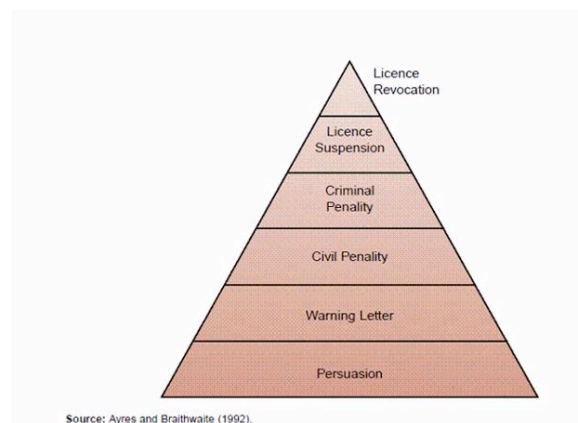
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INTRODUCTION

The basic principle of responsive regulation is that regulators should be responsive to the culture, conduct and context of those they seek to regulate when deciding whether a more or less interventionist response is needed. In other words, “*soft words before hard words, and carrots before sticks*”.¹ It also recognises the need for a diversity of regulatory strategies and the need for all strategies to be practically grounded and context appropriate.²

The model was first developed by Braithwaite and Ayres in their book *Responsive Regulation: Transcending the Deregulation Debate*, however it is important to emphasise that the development of responsive regulation as a theory has been and continues to be a collective effort, contributed to by numerous scholars and institutions, the most important early development being Neil Gunningham, Peter Grabosky and Darren Sinclair's *Smart Regulation* (1998) and the most recent developments being John Braithwaite's *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (2008) and Valerie Braithwaite's *Defiance in Taxation and Governance* (2009).

The basic principles of responsive regulation are simply illustrated in Ayres and Braithwaite's widely recognised “regulatory pyramid” (below). At the base are advisory and persuasive measures, in the middle are mild administrative sanctions and at the top are more punitive sanctions, determined to be sufficiently undesirable to halt the behaviour of the most determined offenders. According to its authors, regulators should focus most of their activity at the bottom and only escalate measures if absolutely necessary and de-escalate when possible.³ The preference for being at the bottom of the pyramid is a presumptive preference that will often be overridden. Pyramids are more likely to be effective when they have a credible enforcement peak.



¹Healy, J. and J. Braithwaite, (2006) “Designing safer health care through responsive regulation”, *The Medical Journal of Australia*, 184(10 Suppl) S56-S59, online at:

<http://www.mja.com.au/public/issues/184_10_150506/health1015_fm.html#0_pgflD-1091789>

² Ibid and Sparrow, M. (2000) “The Regulatory Craft: Controlling Risks, Managing Problems and Managing Compliance, Washington DC: The Brookings Institution.

³ Gunningham, N. (2007) “Prosecution for OHS Offences: Deterrent or Disincentive”, *Sydney Law Review*, 29, 359-390, online at:

<http://www.anu.edu.au/fellows/ngunningham/publications/PDFs/2007_Gunningham_PDD_SLR.pdf>

The following document outlines some examples of responsive regulation applications, both in Australia and overseas. The document tends not to comment conclusively on the success of the approach's application. Often it is difficult to assess even whether responsive regulation principles have been translated into practice in each example or whether they have simply been endorsed aspirationally. Finally, it should be noted that the list is not exhaustive. It simply provides some examples that practitioners might be able to discuss with colleagues who have attempted to implement the approach.

AUSTRALIAN EXAMPLES

HEALTH AND SAFETY

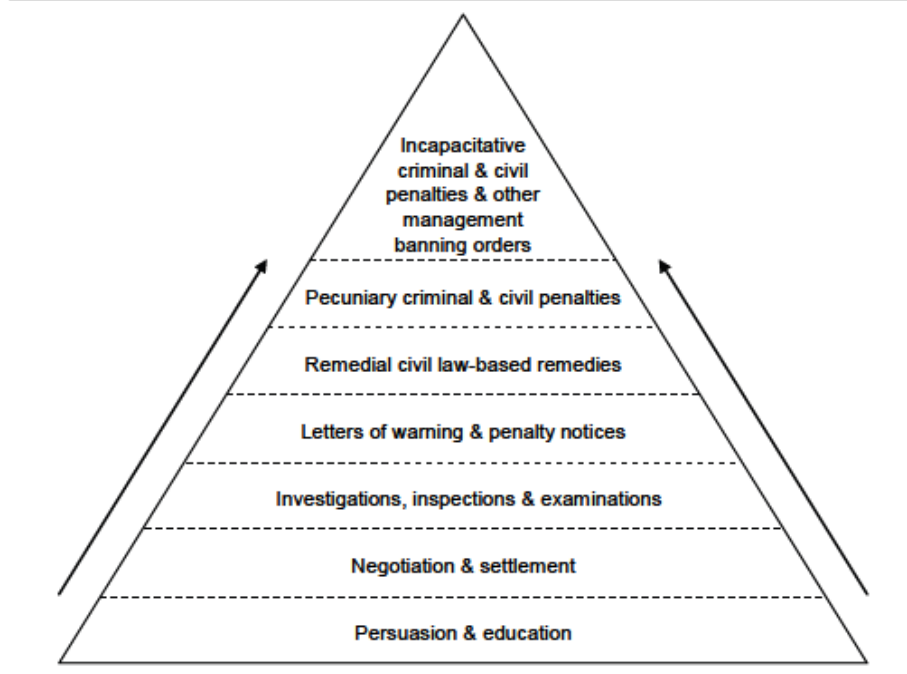
Australia and New Zealand Food Safety Regulation

In their recent research into the regulatory measures imposed upon business by Australian and New Zealand food safety regulators, Australia's Productivity Commission (PC) highlighted a growing movement towards more responsive and self-regulatory strategies.

The PC found that Australian and New Zealand regulators generally use a cooperative, graduated approach to achieving compliance. This means that they are increasingly making efforts to deliver outcomes which minimise adverse impacts on business and provide assistance with compliance.

Most regulators included in the study accepted that effective enforcement must include both 'deterrence' and 'education or persuasion' strategies. They also believed that enforcement policies should consist of an escalation of sanctions as depicted in the following pyramid (and which was included in their final report):

Figure 3 An enforcement pyramid



Source: Gilligan, Bird and Ramsay (1999).

The PC also found that regulators in all jurisdictions favoured the use of education and warnings over site-inspections and punitive approaches. For example, data collected for the NSW Food Authority, Victorian Department of Health and NT

Department of Health and Families indicates a preference for education and informal advice over verbal warnings and a preference for verbal over written warnings.

For more information:

Productivity Commission (2009) *Performance Benchmarking of Australian and New Zealand Business Regulation: Food Safety Research Report*, Melbourne:

Commonwealth of Australia, online at:

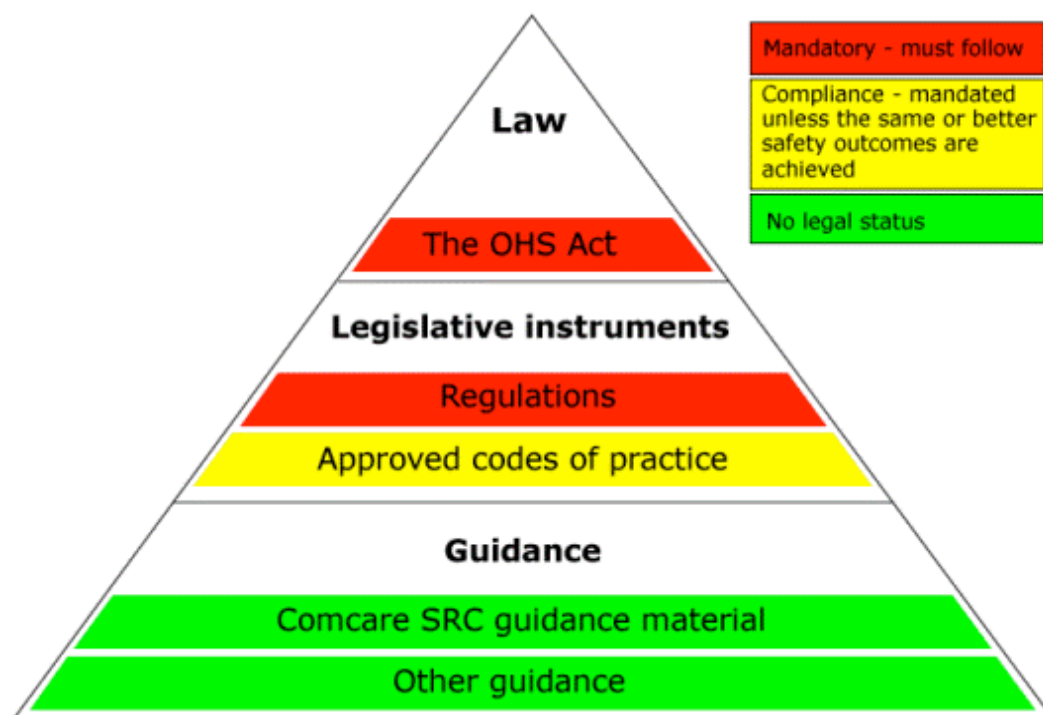
<http://www.pc.gov.au/__data/assets/pdf_file/0020/93503/food-safety-report.pdf>

Occupational Health and Safety

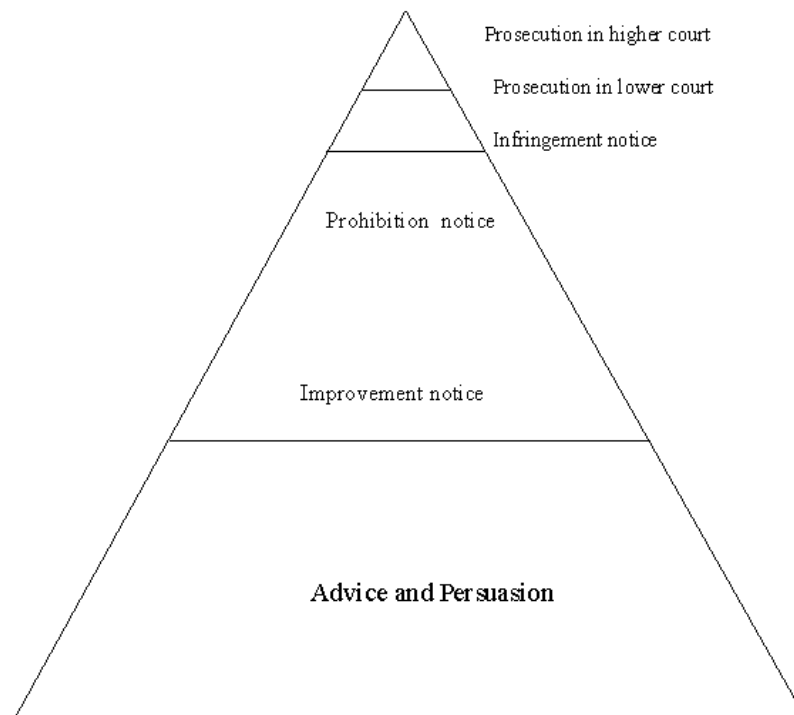
Australia's OHS Regulatory Framework is based upon a *Pyramid of Enforcement*.

The Pyramid represents the hierarchy of documents and strategies that comprise the regulatory framework. The legal status of the documents and severity of the approaches increases the higher one moves up the pyramid.

As displayed by Comcare:



As displayed by Safe Work Australia:



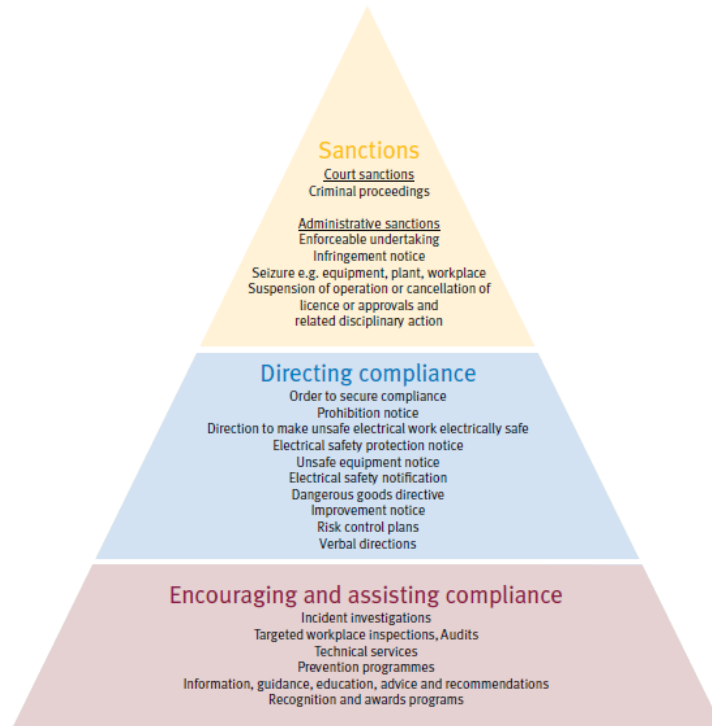
Source: Adapted from Ayres and Braithwaite 1992, p 35.

The Safe Work Australia Website states: “*regulators must balance the use of enforcement strategies which address the minority of flagrant offenders, with the need to encourage and help the majority of employers [who] comply voluntarily*”. The website also cites Braithwaite and Ayres’ point that “*good regulation means invoking different strategies depending upon whether or not business has a self-interest (or perceives itself as having a self-interest) in improving OHS outcomes*” (Braithwaite and Ayres 1992).

Case-Study 1: Queensland Workplace Health and Safety:

Queensland’s Workplace Health and Safety Compliance and Management Policy is based on the national policy however it incorporates its own "Compliance Pyramid" which details three levels of response:

1. encouraging and assisting compliance at the base,
2. directing compliance in the middle and
3. sanctions at the apex.



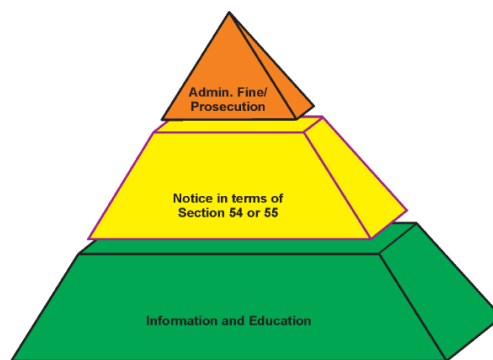
Case study 2: Mining OHS

Efforts have been made to move towards a more responsive regulatory approach in relation to Mining OHS.

In its 2005 enforcement guidelines for the Mine Health and Safety Act, The Department of Mine Health and Safety Inspectorate recommended that:

“...a graduated series of options [be] adopted with consultation and verbal directions as the starting point, progressing through statutory instructions to order compliance, or to an order to halt or suspend operations at a mine or an affected area of a mine; and finally, the recommendation of an administrative fine or prosecution for failure to comply.”

This approach is graphically illustrated on page 7 of the Inspectorate’s guidelines as a simplified version of the responsive regulation pyramid:



The Enforcement Pyramid

Unfortunately though, as Gunningham (2007) points out, none of Australia's three mining states have managed to achieve a workable balance between the bottom layer of "advise and persuade" (as in Queensland and WA), and the harder-edged top layer (e.g. as in NSW Justice Staunton's judgement over the Gretley Mining Disaster in 2004).

For more information:

Comcare, *A practical guide to the OHS regulatory framework*, Commonwealth Government, online at:

<http://www.comcare.gov.au/safety_and_prevention/managing_OHS/ohs_regulatory_framework/a_practical_guide_to_the_ohs_regulatory_framework>

Hermanus, M.A. (2005) *Guideline for Enforcement of the Mine Health and Safety Act*, Department of Minerals and Energy, online at:

<http://www.dme.gov.za/pdfs/mhs/guidelines/guideline_enforcement_mhs_act.pdf>

Gunningham, N. (2007) "Prosecution for OHS Offences: Deterrent or Disincentive?", *Sydney Law Review*, 29(3): 359-390, online at:

<http://www.anu.edu.au/fellows/ngunningham/publications/PDFs/2007_Gunningham_PDD_SLR.pdf>

Gunningham, N. and D. Sinclair (2007) "Responsive OHS Regulation in the Mining Sector", *National Research Centre for OHS Regulation Working Paper 56*, Regulatory Institutions Network, online at:

<<http://ohs.anu.edu.au/publications/pdf/wp%2056%20-%20Gunningham%20and%20Sinclair.pdf>>

Queensland Government (2009) *Compliance and Management Policy 2009*, Queensland Workplace Health and Safety, Electrical Safety and Dangerous Goods Safety Management, online at:

<http://www.deir.qld.gov.au/workplace/resources/pdfs/enforcement_framework_guide2009.pdf>

Safe Work Australia (2009) *Part 3 – On-the-spot fines within a broader OHS policy framework*, Commonwealth Government, online at:

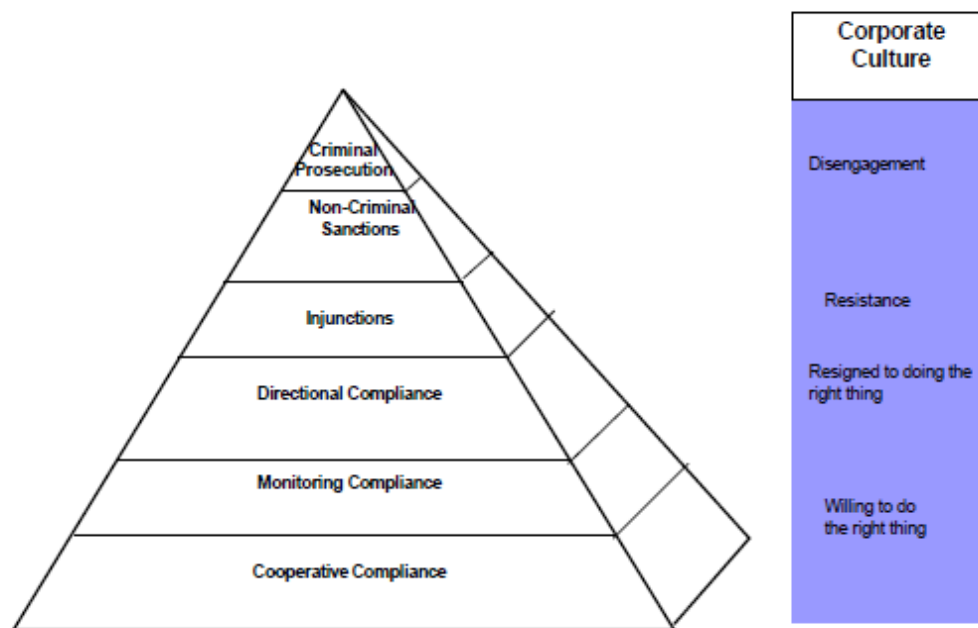
<<http://www.safeworkaustralia.gov.au/swa/AboutUs/Publications/ArchivedDocuments/OnTheSpotFinesResearchReport/Part3-On-the-spotfineswithinabroaderOHSpolicyframework.htm>>

Office of the Gene Technology Regulator (OGTR)

In its 2002 Draft Monitoring and Compliance Framework, the OGTR includes a Compliance Pyramid featuring a hierarchy of compliance enforcement strategies, which escalate in severity and aim to give "accredited organisations every opportunity to comply".

It is the OGTR's goal to maintain the majority of its regulatory activity at the base of the pyramid. As such, their compliance model is accompanied by efforts to foster, in accredited organisations, a corporate culture of risk management and an enabling

environment, underpinned by effective education, which reduces the potential for non-compliance.



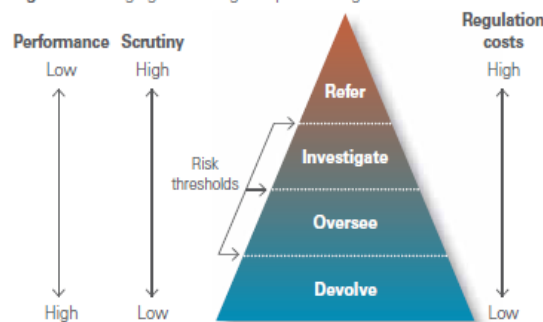
For more information:

Office of the Gene Technology Regulator (2002) *Monitoring and Compliance Framework: In accordance with the Gene Technology Act 2000 (Cth)*, a working document, 26 July, online at:
<http://www.biosafety.gov.cn/image20010518/5066.pdf>

Queensland Health Quality and Complaints Commission

In 2008, the Commission developed a ‘responsive regulation’ model in an effort to hand greater autonomy to healthcare providers so that it could assume more of an oversight, referral and investigative role. They state that the model has “*helped us bring together our two core roles – complaint and investigation management, and standard-setting and quality improvement,*” however it is too early to say how effective the model will be. According to their 08-09 annual report, this is the first time that the responsive regulation model has been used in healthcare.

Figure 5: Managing risk through responsive regulation



Modified from Walshe 2003 after Ayres & Braithwaite

For more information:

Health Quality and Complaints Commission (2009) “Chapter 4: Preventing” in *Annual Report 08-09*, Queensland Government, online at:
<http://www.hqcc.qld.gov.au/_uploads/29407Preventing.pdf>

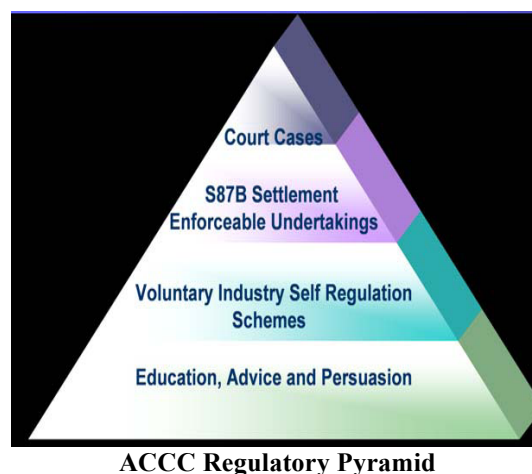
CORPORATIONS AND FINANCE

The Australian Competition and Consumer Commission (ACCC)

The Australian Competition and Consumer Commission uses a version of the compliance pyramid to guide its regulatory operations.

According to Louise Sylvan, ACCC Deputy Chair:

“... for those of you who work internationally as well as nationally, you’ll encounter this compliance pyramid, or enforcement pyramid as it is sometimes called, everywhere in the world now...”



ACCC Regulatory Pyramid

The preference for this voluntary compliance approach was first expressed in 2003 by the ACCC’s then Chairman Graham Samuel.

To measure the effectiveness of the ACCC’s enforcement strategies on compliance with the Trade Practices Act, in 2004, RegNet and the ACCC embarked upon a joint research project called the “ACCC Enforcement and Compliance Project”. For more information about the project, see Melbourne Law School (2009) and Parker et al (2004) below.

For more information:

Grant, R. (2005) “The ACCC’s regulatory strategy”, in *Australia’s corporate regulators – the ACCC, ASIC and APRA, Research Brief no. 16 2004-05*, online at the Parliamentary Library of Australia: <<http://www.aph.gov.au/library/Pubs/RB/2004-05/05rb16.htm#accs>>

Melbourne Law School (2009) “The Australian Competition and Consumer Commission Enforcement and Compliance Project”, *Melbourne University*, online at:

<<http://www.cartel.law.unimelb.edu.au/go/related-projects/the-australian-competition-and-consumer-commission-enforcement-and-compliance-project>>

Parker, C. (2004) “Restorative justice in business regulation? The Australian Competition and Consumer Commission's use of enforceable undertakings”, *The Modern Law Review*, 67(2): 209.

Parker, C, Braithwaite, J and N. Stepanenko (2004) ACCC Enforcement and Compliance Project: Working Paper on ACCC Compliance Education & Liaison Strategies, *Regulatory Institutions Network*, online at:
<<http://cccp.anu.edu.au/projects/compliancereportapril2004.pdf>>

Sylvan, L. (2004) “Australia’s competition and consumer law: ensuring compliance and enforcing the law”, *Speech to the Trade Practices & Competition Law Conference*, Sydney, 16 February 2004, online at:
<<http://www.accc.gov.au/content/item.phtml?itemId=499963&nodeId=ff78498f8c83c23ea8f7fd4036a4268a&fn=Australias+competition+and+consumer+law+ensuring+compliance+and+enforcing+the+law.pdf>>

Australian Securities and Investment Commission (ASIC)

Former ASIC Chairman, Jeffery Lucy, described the Commission’s regulatory approach in terms of a tri-partite pyramid. At its base are those who comply with the law. For this group, ASIC sees that it’s role is “*to provide guidance to help them continue to comply.*” The middle group contains opportunists who are “*prepared to bend the rules if they think they can get away with it.*” ASIC’s strategy with this band is to influence their views and conduct. The peak of the ASIC pyramid consists of those who engage in improper and illegal behaviour. ASIC uses its full enforcement strength to regulate this group.

ASIC places a strong emphasis on enforcement as the essential component of effective regulation. However, it also acknowledges the importance of longer-term education and persuasion, in guaranteeing the success of regulatory enforcement.

For more information:

ASIC (2009) “Better Regulation”, online at:
<<http://www.asic.gov.au/betterregulation>>

Bird, H., Chow, D., Lenne, J. and I. Ramsay (2003) “Asic Enforcement Patterns”, *Centre for Corporate Law and Securities Regulation: The University of Melbourne*, online at: <<http://cclsr.law.unimelb.edu.au/research-papers/ASIC%20Enforcement.pdf>>

Grant, R. (2005) “ASIC’s regulatory strategy” in *Australia’s corporate regulators – the ACCC, ASIC and APRA, Research Brief no. 16 2004-05*, online at the Parliamentary Library of Australia: <<http://www.aph.gov.au/library/Pubs/RB/2004-05/05rb16.htm#asics>>

Lucy, J. (2004) “Significant regulatory issues facing ASIC and Australian Businesses”, *paper delivered to the Australia-Israel Chamber of Commerce*, 4 August 2004, (p. 3) online at:
<[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/AICC_speech_040804.pdf/\\$file/AICC_speech_040804.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/AICC_speech_040804.pdf/$file/AICC_speech_040804.pdf)>

Australian Taxation Office (ATO)

The ATO’s regulatory operations are guided by the “Cooperative Compliance Model” of self-regulation and voluntary compliance - an acknowledged adaptation of Braithwaite and Ayres’ Regulatory Compliance Model. ATO Commissioner Michael D’Ascenzo comments, *“The Compliance Model helps us understand the causes of compliance so that our responses are tailored to the risks.”*

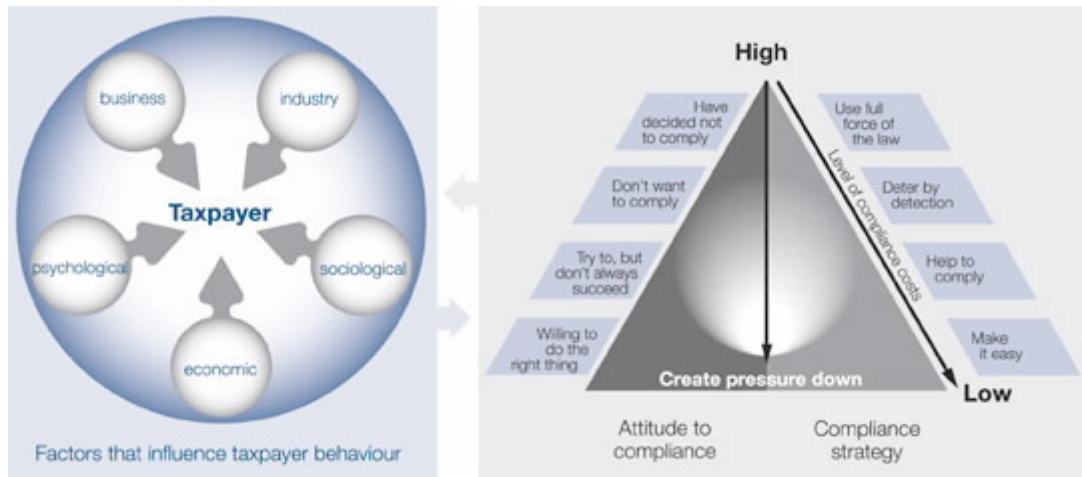
The ATO’s approach to compliance is twofold. It seeks to maximise the number of taxpayers who choose to voluntarily comply by making it as easy as possible for them to understand and meet their tax obligations. But they have also developed strategies to deter, detect and address non-compliance. Their Model emphasises the need to better understand why people are not complying, and to develop appropriate and proportionate responses.

In this vein, the ATO has formulated a tool called the BISEP which is used to analyse the taxpayer’s reasons (Business, Industry, Sociological, Economic and Psychological), for behaving in a particular way. Understanding reasons for compliance enables the ATO to enforce the law while being responsive to the drivers of a taxpayer’s non-compliance. By understanding drivers of non-compliance, the ATO is better positioned to understand and manage the motivational postures of taxpayers and tailor their regulatory intervention accordingly. The ATO Compliance Model was first developed by the Cash Economy Task Force (1998) that set out to understand and respond to systemic causes of tax non-compliance through cash-economy activity.

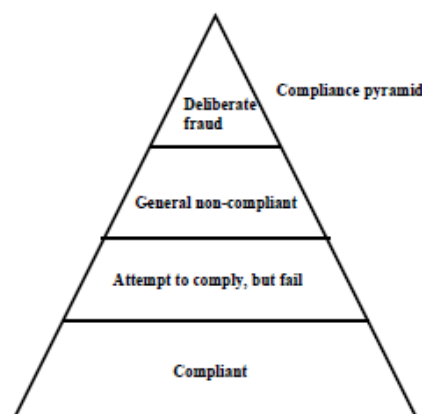
The BISEP tool is based on work conducted by Dr. Valerie Braithwaite which describes five main attitudes and responses to compliance. Professor Braithwaite’s work on motivational postures has also been used to inform the ATO’s conceptualisation of their clients in four main categories:

1. disengaged clients who have decided not to comply,
2. resistant clients who don’t want to comply,
3. captured clients who try to comply, but don’t always succeed, and
4. accommodating clients who are willing to do the right thing.

These categories are listed down the left hand side of the regulatory pyramid with their recommended responses on the right:



The effectiveness of this Compliance Model is evident in its popularity among other institutions and organisations, including the New Zealand Inland Revenue Department (discussed later), the OECD (see reference below) in its Taxation Approaches, and the EU, in their 'Risk Management Guide for Tax Administrators (p.24) – whose compliance pyramid is as follows:



For more information:

Australian Taxation Office (2000) *Cooperative Compliance: Working with Large Businesses in the New Tax System*, online at:

<<http://ctsi.anu.edu.au/publications/ATOpubs/cooperative%20compliance.pdf>>

Australian Taxation Office, *Introduction to the compliance model*, online at:

<<http://www.ato.gov.au/corporate/content.asp?doc=/Content/5704.htm>>

Australian Taxation Office, *Self-managed superannuation funds-our compliance approach*, online at:

<http://www.superannuationnews.com/ATO_Assist/2002-03-04_001_-_nat2065.pdf>

Braithwaite, V. and J. Braithwaite, (2001) "Managing taxation compliance: the evolution of the Australian Taxation Office compliance model", in M. Walpole and C. Evans (eds), *Tax Administration in the 21st Century*, St. Leonards: Prospect Media, pp. 215-224, online at: <<http://vab.anu.edu.au/pubs/1/managingtaxation.pdf>>

Braithwaite, V. and J. Job (2003) *The theoretical base for the ATO compliance model*, Centre for Tax System Integrity Research Note, online at:
<<http://ctsi.anu.edu.au/publications/RN5.pdf>>

Cash Economy Task Force (1998) *Improving Tax Compliance in the Cash Economy*, Canberra: Commonwealth of Australia, online at:
<<http://www.ato.gov.au/content/downloads/SB39073.pdf>>

Commonwealth of Australia (1999), *House of Representatives Questions on Notice: Superannuation: Compulsory Contributions Investigations, Question 504*, 13 May 1999, online at:
<http://parlinfo.aph.gov.au:80/parlInfo/genpdf/chamber/hansardr/1999-05-13/0186/hansard_frag.pdf;fileType%3Dapplication%2Fpdf>

D'Ascenzo, M. (2005) "Compliance: The Right mix of Help and Enforcement: in *Relationships between Tax administrations and Tax Agents/Taxpayers*, presentation given to the Asia-Oceania Consultants Association (AOTCA) general meeting, Manila 11 November, online at:
<<http://www.ato.gov.au/corporate/content.asp?doc=/content/66215.htm>>

European Commission Taxation and Customs Union Directorate General (2006) *Risk Management Guide for Tax Administrations*, Brussels, European Commission, online at:
<http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_cooperation/gen_overview/Risk_Management_Guide_for_tax_administrations_en.pdf>

Murphy, K. (2004) "Moving towards a more effective model of regulatory enforcement in the Australian Taxation Office", *British Tax Review*, 6(2004) 603-619.

Organisation for Economic Co-operation and Development (2005) *Second Meeting of the Forum on Tax Administration: Background Note on Meeting's Discussion Themes*, 1-2 June, Dublin Castle, Dublin, online at:
<www.oecd.org/dataoecd/44/19/33818656.pdf>

The Centre for Tax System Integrity Website: <<http://ctsi.anu.edu.au>>

Australian Communications and Media Authority (ACMA)

The ACMA is the sole regulator responsible for overseeing the operation of the 'Do Not Call Scheme' (DNCS), the 'Do Not Call Register' (DNCR) and for investigating breaches of the Do Not Call Register Act (2007). The DNCS was established in response to community concern about the increase in unsolicited telemarketing calls. By joining the Do Not Call Register, individuals are able to list their contact details, free of charge, so that they will be excluded from receiving particular telemarketing

calls. Any company that calls or arranges for a registered number to be called may be in breach of the DNCR Act (2007) and could face penalties.⁴

The ACMA's response to breaches by Dodo, an Australian-based telecommunications provider, serves as a strong example of the effectiveness of a responsive regulatory approach. ACMA commenced formal investigations into Dodo's operations in 2007 after receiving over 100 complaints from individuals who had been contacted by Dodo despite having been listed on the DNCR for more than the requisite 30 days. ACMA sent Dodo an advisory letter, followed by a warning letter detailing allegations. Upon commencement of their investigations, ACMA found that Dodo had not taken due precaution to inform their contractors and was guilty of breaching the Act. Dodo was issued with an infringement notice and fined \$147,000 – the largest sum paid since the Act's introduction in early 2007. The issue did not escalate to court action, in recognition of Dodo's cooperation with ACMA's investigations.

This example highlights how the DNCS provides a simple vehicle through which issues can be considered by the register operator and escalated up the regulatory pyramid as needed. It also shows how the DNCR and Telecommunications Acts give ACMA a wide and flexible range of functions and powers, thereby providing them with a strong responsive regulatory framework. Further, the DNCR Act gives ACMA the authority to escalate its action until an outcome is achieved and to apply a regulatory response proportionate to the degree of non-compliance. Finally, the Dodo case-study is a good example of where the ACMA used its powers with strategic intent, i.e. it believed it knew *where* on the regulatory pyramid it ought to direct its energy and *when* to do so to achieve the most optimal result.

For more information:

ACMA (2009) "Industry self-regulation", *Commonwealth Government*, online at: <http://www.acma.gov.au/WEB/STANDARD/pc=PC_90162>

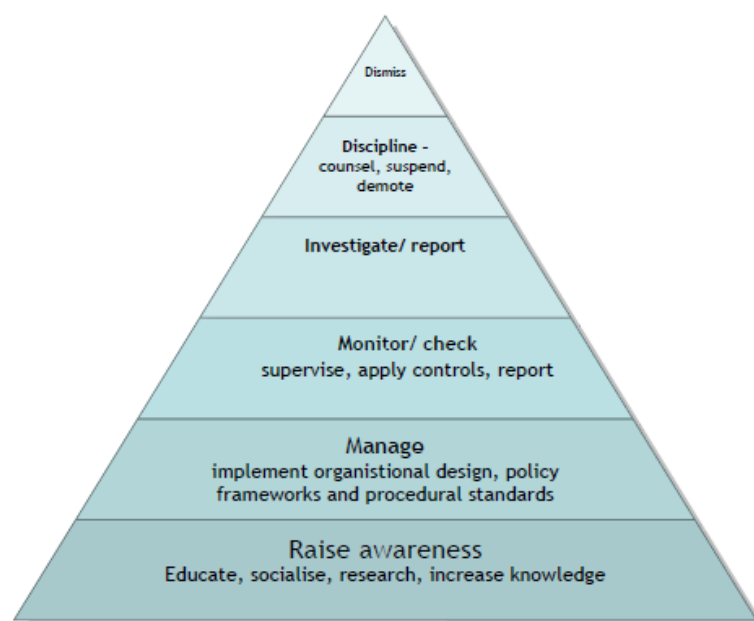
Crompton, M, Cowper, C and C. Jefferis (2009) "The Australian Dodo Case: an insight for data protection regulation", *World Data Protection Report, The Bureau of National Affairs*, vol. 9, no.1, online at: <<http://www.iispartners.com/downloads/WDPR%20Dodo%20article%20Jan%202009%20EXTRACT%20WDPR0109.pdf>>

Anti-Corruption Agencies (ACAs)

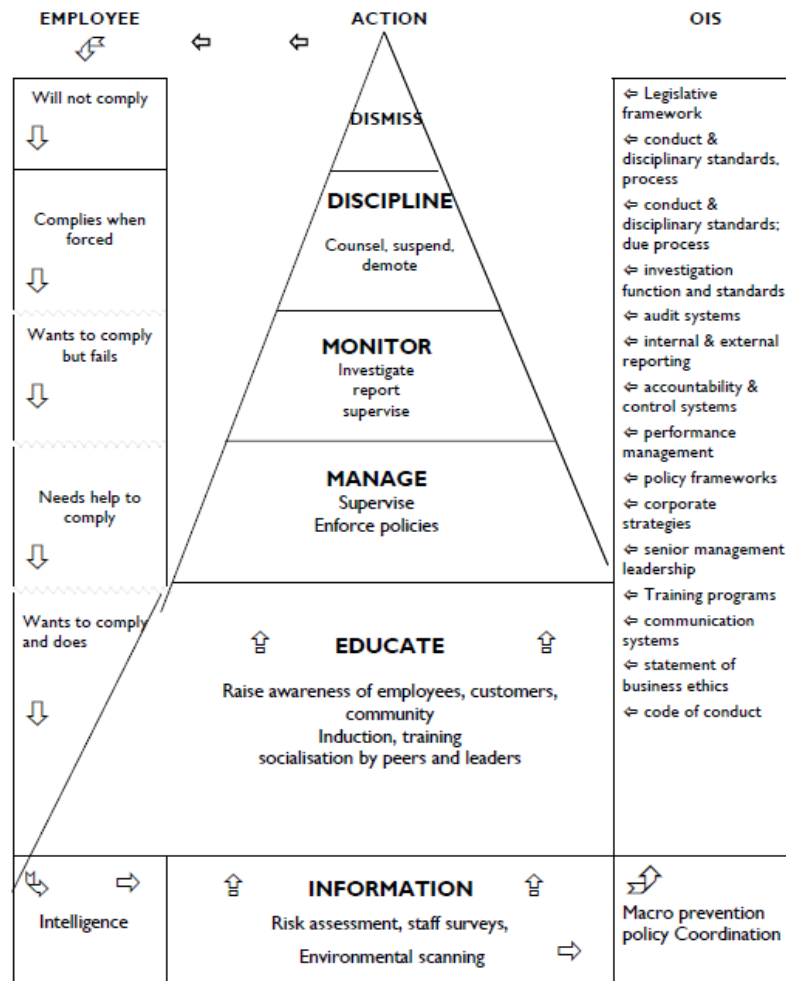
Mills (2008) suggests that the fields of regulation and compliance may have something to offer the still developing discipline of corruption prevention: "...*both are concerned with understanding and promoting ways to increase behaviour that conforms to desired standards of conduct and reduce non-complying behaviour....both activities employ similar tools to achieve their objectives*". Her 2008 paper considers whether and how responsive regulation might be applied to the work of Anti-Corruption Agencies (ACAs). Drawing on the Australian Quarantine and Inspection Service's (AQIS) enforcement pyramid and Ayres and Braithwaite's

⁴ <https://www.donotcall.gov.au/>

‘regulatory pyramid’, the paper proposes that ACAs incorporate the following models into their regulatory responses:



Objective	Example
Level 1: Raise awareness	A new employee receives an <i>induction</i> that includes a copy of and training in the <i>code of conduct</i> that refers to <i>conflicts of interest</i> procedures.
Level 2: Manage	The employee goes to work in the organisation's <i>procurement</i> division and is consequently subject to the organisation's <i>conflict of interest procedures</i> which require disclosures of <i>conflicts of interest</i> (potential, actual and perceived) as a standard declaration in all purchasing documentation submitted for approval.
Level 3: Monitor and check	The manager of the <i>procurement</i> division <i>authorises purchases</i> based on the <i>documentation</i> submitted and reviews any <i>conflicts</i> disclosures made. The <i>database of conflict of interest declarations</i> are reviewed by the designated <i>conflicts of interest officer</i> on a regular basis. The organisation's internal audit program conducts a 2 year cycle of <i>file audits</i> that includes <i>procurement</i> records.
Level 4: Report and investigate	The organisation has a confidential <i>internal reporting system</i> for employees to report improper conduct that breaches proper procedure. An allegation that the employee has awarded a contract to a related contractor is received this way. The organisation's <i>internal investigations staff</i> investigate the allegations with reference to the informant, the <i>conflicts database</i> and the audit report and establishes that the allegation has substance.
Level 5: Discipline	Based on the findings of fact (eg, small amount of money, no direct personal benefit, the related contractor met the specifications) the employee is <i>formally warned</i> and <i>demoted</i> . ALTERNATIVELY, OR IN THE EVENT OF REPEATED CONDUCT ...
Level 6: Dismiss	Based on the seriousness of the conduct the employee is <i>dismissed</i> from the organisation.



This recognition of the need for a responsive approach is also found in the Attorney General's paper on *Australia's Approach to Fighting Corruption*, which specifically emphasises the need for the criminal justice system to be "...responsive to changing circumstances and....receptive to strategies for improvement."

For more information

Attorney General's Department, "Australia's Approach to Fighting Corruption", online at:

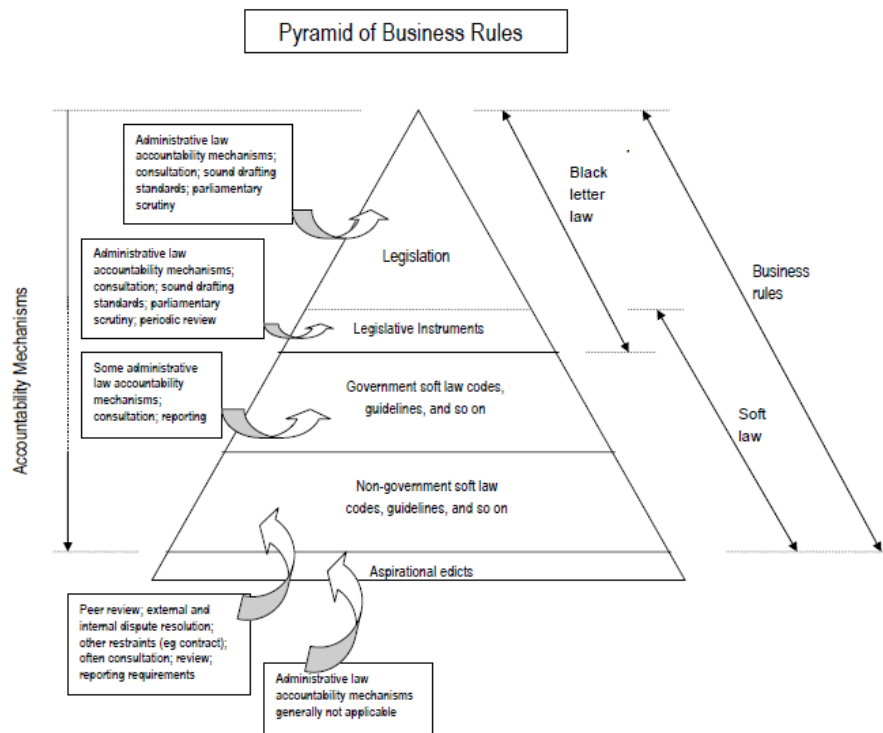
<[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~Qn0000InformationPaperAustraliasApproachtoFightingCorruption.DOC/\\$file/Qn0000InformationPaperAustraliasApproachtoFightingCorruption.DOC](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~Qn0000InformationPaperAustraliasApproachtoFightingCorruption.DOC/$file/Qn0000InformationPaperAustraliasApproachtoFightingCorruption.DOC)>

Mills, A. (2008) "Applying the Enforcement Pyramid to Organisational Corruption Prevention", paper prepared for the *Ethics and Integrity of Government Study Group*, EGPA Conference, Rotterdam, 3-5 September, online at:

<[http://www.fsw.vu.nl/en/Images/A%20Mills%20\(Australia\)%20Applying%20the%200Enforcement%20Pyramid%20to%20Organisational%20Corruption%20Prevention_cm31-49079.pdf](http://www.fsw.vu.nl/en/Images/A%20Mills%20(Australia)%20Applying%20the%200Enforcement%20Pyramid%20to%20Organisational%20Corruption%20Prevention_cm31-49079.pdf)>

Administrative Review Council (ARC)

The ARC's November 2008 report *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation*, details a pyramid of business rules, which differentiates between and suggests the appropriate application of 'black letter' versus 'soft' law.



Although the report makes no mention of responsive regulation, the emphasis on "soft" law reflects the same model of favouring, at least initially, an "enabling" rather than punitive approach to enforcement.

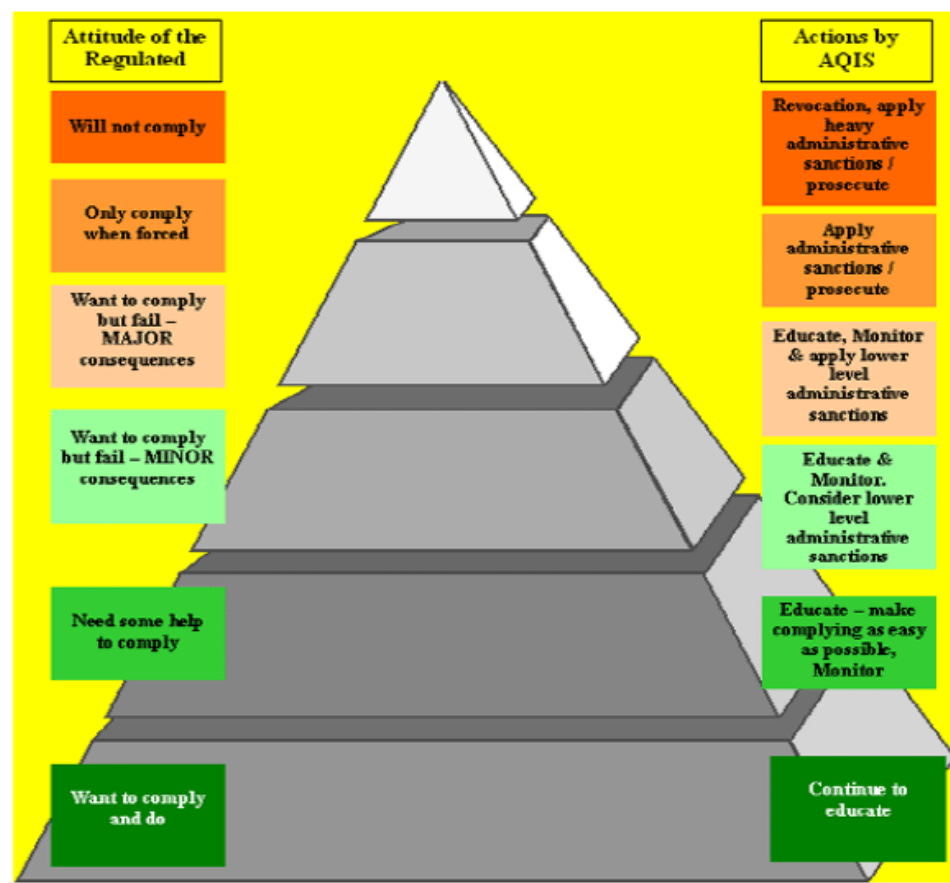
For more information

Administrative Review Council (2008) *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation*, Canberra: Commonwealth of Australia, p.x online at:

<[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~d_ARC+Report+No.+49+Complex+Regulation.pdf/\\$file/d_ARC+Report+No.+49+Complex+Regulation.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~d_ARC+Report+No.+49+Complex+Regulation.pdf/$file/d_ARC+Report+No.+49+Complex+Regulation.pdf)>

Australian Quarantine and Inspection Service (AQIS)

According to AQIS' Compliance and Enforcement Strategy 2002-2003, it will resolve issues by "...open and co-operative negotiation, where possible using the 'regulatory pyramid' approach set out within the Strategy." Their regulatory pyramid is laid out below. AQIS also states that it "...places its regulatory focus at the lower end of the pyramid to achieve an efficient delivery of its service."



Ref: QUARANTINE LAWS AND THE ROLE OF AQIS Commonwealth of Australia May 2007

For more information

Australian Customs Service (2005) “Application of Enforcement Powers in Respect to the Quarantine Act 1908 and the Customs Act 1901 Arising from the Operation of the International Trade Modernisation Legislation (ITML)”, *Australian Government*, online at: <www.daff.gov.au/_data/assets/pdf_file/0012/134202/cn_05-02.pdf>

Australian Quarantine and Inspection Service (AQIS) & Australian Customs Service (2007) “Guidelines on Enforcement Powers in Respect to Offence Provisions under the Customs Act 1901 and Compliance Agreements under the Quarantine Act 1908”, *Australian Government*, online at:

<http://www.aqis.gov.au/icon32/asp/ex_topiccontent.asp?TopicType=Quarantine+Alert&TopicID=7500>

Mills, A. (2008) “Applying the Enforcement Pyramid to Organisational Corruption Prevention”, *paper prepared for the Ethics and Integrity of Government Study Group, EGPA Conference, Rotterdam, 3-5 September*, online at:

<[http://www.fsw.vu.nl/en/Images/A%20Mills%20\(Australia\)%20Applying%20the%200Enforcement%20Pyramid%20to%20Organisational%20Corruption%20Prevention_tcm31-49079.pdf](http://www.fsw.vu.nl/en/Images/A%20Mills%20(Australia)%20Applying%20the%200Enforcement%20Pyramid%20to%20Organisational%20Corruption%20Prevention_tcm31-49079.pdf)>

The NSW Government's 'Better Regulation Office'

The Better Regulation Office has developed a *Guide to Better Regulation*. Their approach is thin on responsiveness and does not use a pyramid approach to escalate or de-escalate, but it does make the important point that options for achieving compliance involve non-regulatory approaches that should be tried or considered first:

"If it has been determined that there is a need for government action, the starting point should be a non-regulatory approach. Some policy problems may be more efficiently or effectively addressed by the market or by individuals acting without government involvement. Non-regulatory approaches are options to deal with a policy problem that do not involve government intervention to direct the actions of people or organisations. It is important to consider non-regulatory options because these often have lower costs and less impact on markets than regulatory options. Stakeholders should be consulted to help determine whether a non-regulatory approach might be appropriate in a given situation. Types of non-regulatory approaches include: provision of information, self-regulation, quasi-regulation, and co-regulation."

According to their website, the Better Regulation Office was established as a means of ensuring that regulations are effective in achieving their objectives and do not impose unnecessary burdens on business and the community. This initiative is part of the NSW Government's commitment to cut red tape, which in turn forms part of its 'investing in a better future' plan.

The NSW government has articulated what characterises good regulation in their *Guide to Better Regulation*, and more specifically through the following seven Better Regulation principles (which are outlined in the Guide):

Principle 1: The need for government action should be established

Principle 2: The objective of government action should be clear

Principle 3: The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options

Principle 4: Government action should be effective and proportional

Principle 5: Consultation with business and the community should inform regulatory development

Principle 6: The simplification, repeal, reform or consolidation of existing regulation should be considered

Principle 7: Regulation should be periodically reviewed, and if necessary reformed to ensure its continued efficiency and effectiveness

The *Guide to Better Regulation* assists agencies to develop regulation which is "required, reasonable and responsive", by providing details on how to apply the above principles.

For more information:

Better Regulation Office (2009) "Better Regulation Requirements", *Department of Premier and Cabinet, NSW Government*, online at:

<http://www.betterregulation.nsw.gov.au/better_regulation_requirements>

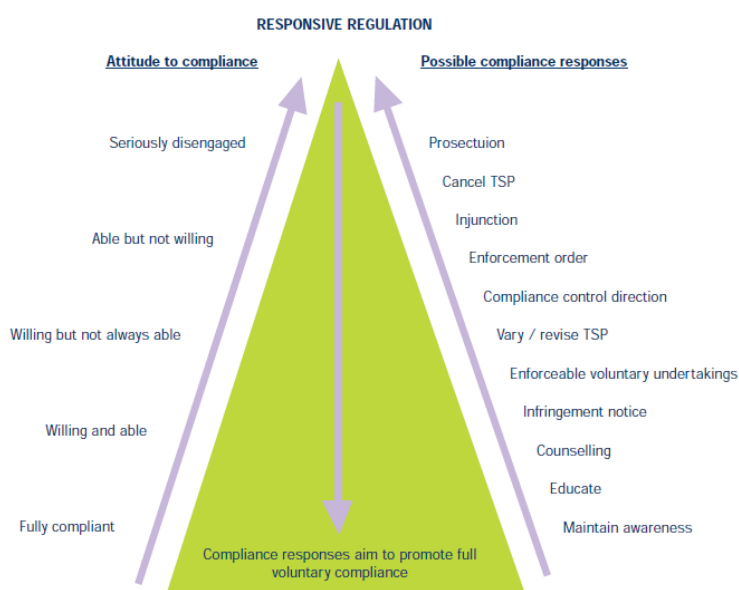
Better Regulation Office (2009) “Guide to Better Regulation”, *Department of Premier and Cabinet, NSW Government*, online at:
http://www.betterregulation.nsw.gov.au/___data/assets/pdf_file/0009/16848/01_Better_Regulation_eGuide_October_2009.pdf

Better Regulation Office (2009) “The Better Regulation Office”, *Department of Premier and Cabinet, NSW Government*, online at:
<http://www.betterregulation.nsw.gov.au/>

Office of Transport Security (OTS)

The OTS states that their regulatory approach is:
“...to ensure industry compliance with the law and regulations by effecting changes in industry participant behaviour towards their regulatory obligations.”

To further these objectives, the Office’s regulatory activities are guided by a responsive regulation pyramid, which lists a continuum of motivational postures and their necessary responses, but which focuses greatest attention on achieving compliance through the lower levels of awareness building and education.



For more information

Office of Transport Security (2008) *Our Regulatory Philosophy*, Department of Infrastructure, Transport, Regional Development and Local Government, Canberra: Commonwealth of Australia, online at
http://www.infrastructure.gov.au/transport/security/pdf/OTS_Regulatory_Philosophy.pdf

CHILDREN AND YOUNG PEOPLE

Family Group Conferencing

The popularity and success of Family Group Conferencing, since its inception in the late 80s, serves as a testament to the effectiveness of responsive regulatory

approaches that embrace restorative justice. Not all conferencing programs are located within a responsive framework, yet in many countries they are.

As Adams writes, “*family group conferencing (FGC) brings to the project of child protection a form of restorative justice within a framework of responsive regulation.*”

Family group conferences were first legislated as the standard for child and family decision making in New Zealand in 1989 and since that time have experienced widespread and international adoption among professionals and academics (Harris 2008). Australia, in particular, has seen a steady embrace of FGC since it was first introduced in 1992 by a Victorian NGO. The programs or variations on them are now used in all jurisdictions except the Northern Territory.

For more information:

Adams, Paul and Susan Chandler (2004) “Responsive Regulation in Child Welfare: Systemic Challenges to Mainstreaming the Family Group Conference”, *Journal of Sociology & Social Welfare*, 31(1) 93–116.

Harris, N. (2008) “Family group conferencing in Australia 15 years on”, *Child Abuse Prevention Issues*, vol. 27, online at:
<<http://www.aifs.gov.au/nch/pubs/issues/issues27/issues27.html>>

Huntsman, L. (2006) “Family group conferencing in a child welfare context – a review of the literature”, *NSW Department of Community Services*, online at:
<http://www.community.nsw.gov.au/docswr/_assets/main/documents/research_family_conferencing.pdf> (esp. p.17: “A systemic approach to FGC”)

Merkel-Holguin, L. (2004) “Sharing Power with the People: Family Group Conferencing as a Democratic Experiment”, *Journal of Sociology & Social Welfare*, 31(1) 155-173.

Mirsky, L. (2003) “Family Group Conferencing Worldwide”, *International Institute for Restorative Practices*, online at:

Part 1: <<http://www.iirp.org/library/fgcseries01.html>>

Part 2: <<http://www.iirp.org/library/fgcseries02.html>>

Part 3: <<http://www.iirp.org/library/fgcseries03.html>>

Pennell, J. (2004), “Family Group Conferencing in Child Welfare: Responsive and Regulatory Interfaces”, *Journal of Sociology and Social Welfare*, 31(1) 117-135, online at:
<<http://www.olic.edu/~jolson/433/Family%20Group%20Conferencing%20in%20Child%20Welfare--%20Responsive%20and%20Regulatory%20Interfaces.pdf>>

Trotter, C., Sheehan, R., Liddell, M., Strong, D. and C. Laragy (1999), “Evaluation of the Statewide Implementation of Family Group Conferencing”, *Protection and Care, Youth and Family Services, Victorian Department of Human Services*, online at:
<<http://www.varj.asn.au/pdf/99%20FGC%20Eval%20Vic.pdf>>

Office for Children, Youth and Family Support⁵: Children's Policy and Regulation Unit (CPRU)

According to their Compliance Strategy (2009), the CPRU ensures compliance is achieved is “*through the practice of responsive regulation.*” This means that in the first instance, the Office supports Children's Services to develop their own effective responses rather than stipulating what they must do. However, in the event that this fails, the CPRU may immediately escalate its approach by utilising statutory means to elicit compliance. This may be through issuing a *Compliance Notice, Suspension, or Safety Suspension.*

The CPRU describes its regulatory approach as: “*collaborative, strengths-based and child centred.*” It seeks to “*ensure services feel empowered to meet their minimum requirements and understand the need for the requirements to exist,*” noting that “*Highly developed relationships enable regulators to work proactively to achieve compliance.*”

According to the CPRU (2009), when noncompliance is identified, Children's Services Advisers utilise Braithwaite and Ayres' *Responsive Regulation Model* along with their own adapted version of this pyramid, *called the CPRU Practice Model.* This latter model outlines the array of responses available to assist services to address noncompliance (see next page).

For more information

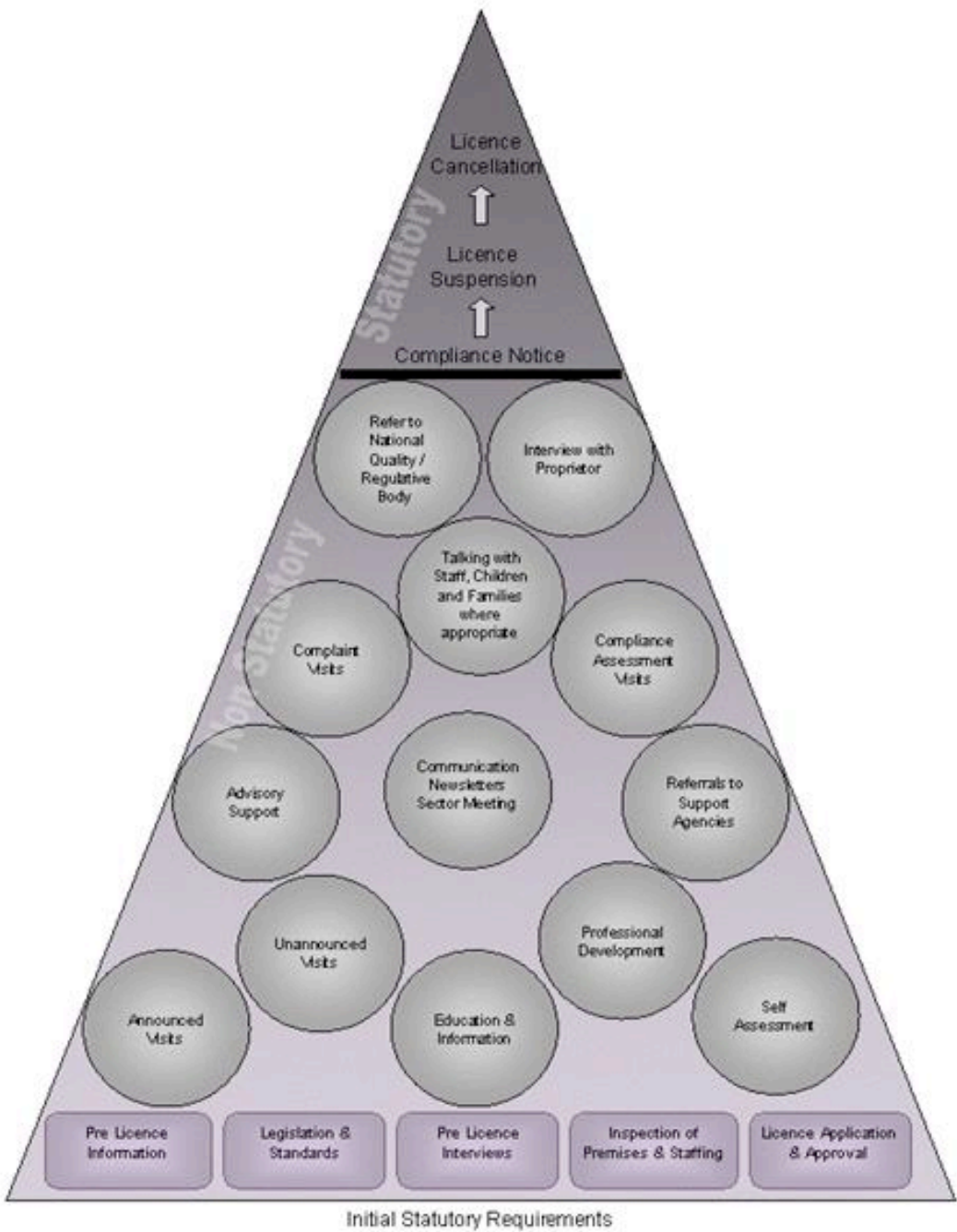
Office for Children, Youth and Family Support (2009) “Compliance Strategy”, *Children's Policy and Regulation Unit, Department of Disability, Housing and Community Services*, online at:

<http://www.dhcs.act.gov.au/__data/assets/word_doc/0005/49829/CPRU_Compliance_Strategy_-_January_2009.doc>

⁵ An office of the Department of Disability, Housing and Community Services, ACT Government

Diagram B: CPRU Practice Model

DRAFT



Further information on responsive approaches to child protection:

Allen Consulting Group (2008) “Inverting the pyramid: enhancing systems for protecting children”, *Australian Research Alliance for Children & Youth*, online at: <http://www.aracy.org.au/cmsdocuments/REP_Inverting_the_Pyramid_Enhancing_Systems_for_Protecting_Children_2009.pdf>

Connolly, Marie (2009) “Professional Responses: Who Does What in Domestic Violence and Child Protection?”, *Communities, Children and Families Australia*, 4(1) 36-39.

Harries, Maria (2009) “The Downside of Regulation and the Opportunities for Public Engagement about the Care and Protection of Children”, *Communities, Children and Families Australia*, 4(1) 47-51.

Parton, Nigel (2009) “How Child Centred are Our Child Protection Systems and How Child Centred Do We Want our Child Protection Regulatory Principles To Be?”, *Communities, Children and Families Australia*, 4(1) 59-64.

Scott, Dorothy (2009) “Regulatory Principles and Reforming Possibilities in Child Protection: What Might be in the Best Interests of Children?”, *Communities, Children and Families Australia*, 4(1) 65-70.

The Community Partnerships for Protecting Children initiative in the US:
<<http://www.dhs.state.ia.us/cppc/>>

The Every Child Matters reforms in the UK:
<<http://www.dcsf.gov.uk/everychildmatters/>>

ENVIRONMENT

South Australian Environment Protection Agency (EPA)

The following mission statement from the South Australian EPA highlights a degree of responsiveness in their approach to ensuring compliance:

“The powers and duties given to the EPA by the environmental legislation we administer are significant. They include a variety of tools to ensure that all reasonable and practicable measures are taken to protect, restore and enhance the quality of the environment. Much of this is achieved through providing advice and guidance, partnering with other organisations, education and regulation. However, in some circumstances, we will use our enforcement powers. Our aim is that the balanced and principled use of compliance and enforcement tools will ensure that our actions are consistent, fair and effective, and will provide assurance to the community that the EPA is working to fulfill its role of protecting the environment.”

This responsiveness to the conduct, culture and context of the regulatee is reflected in the following factors and principles, which are taken into account when the Authority determines what compliance and enforcement action to take:

- the seriousness of the contravention, for example the nature and extent of the impact, harm or potential harm to the environment or the potential to undermine the regulatory regime and
- the extent and speed of remedial action required
- the compliance history
- the alleged offender's willingness to cooperate as evidenced by factors including remediation action taken or offered, and whether the offender brought the incident to the attention of the EPA.

5 Principles for compliance and enforcement decisions:

1. Proportional
2. Consistent
3. Transparent
4. Targeted
5. Timely

In their report, “Compliance and enforcement regulatory options and tools”, the EPA presents a series of diagrams, similar to the regulatory pyramid, which detail the sequence that different levels of escalation ought to follow for a particular scenario, e.g.:

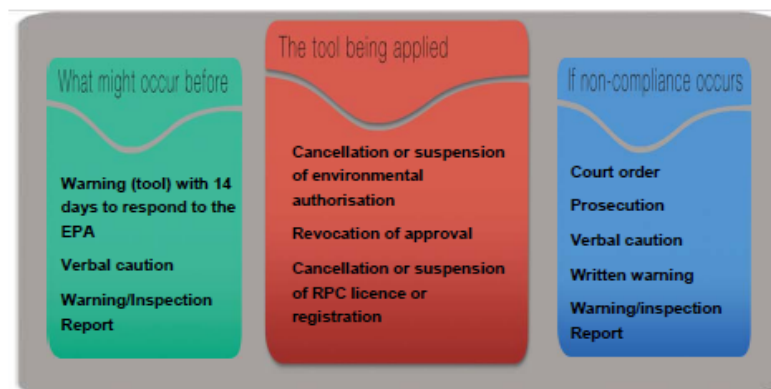


Figure 4 Cancellation of EPA authorisation/approval or RPC licence/registration

For more information:

Environment Protection Authority (2009) “Compliance and enforcement regulatory options and tools”, *South Australian Government*, online at:
http://www.epa.sa.gov.au/xstd_files/Licensing/Guideline/cem.pdf

Environmental Protection Authority (2009) “What we do: compliance & enforcement statement”, *South Australian Government*, online at:
http://www.epa.sa.gov.au/what_we_do/compliance_and_enforcement_statement

PRIVACY

Australian Privacy Foundation

The Australian Privacy Foundation is the peak non-governmental organisation dedicated to upholding the privacy rights of Australians. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. The following quote summarises well the Foundation's approach to regulation:

"...we caution against the often asserted (by industry) assumption that provided consumers are given enough information, they can be left to make their own choices free of 'heavy handed' regulation. Our extensive experience leads us to the conclusion that there can never be an effective 'free market' in relation to some important issues and that some industry practices are simply not acceptable. We have no ideological commitment to regulation for its own sakes but neither do we accept that it is inherently undesirable and to be minimised. There should be 'as much regulation as necessary, but no more than is required' to deliver agreed policy outcomes."

As stated in a recent submission, the Foundation "*strongly*" supports a "...'*responsive regulation*' model that includes all levels from education and awareness activity, through conciliation and mediation of complaints and compliance monitoring to vigorous proactive enforcement activity by regulators to address serious or repeated non-compliance and systemic failures."

For more information:

Australian Privacy Foundation, online at: <<http://www.privacy.org.au/>>

Australian Privacy Foundation (2009), "Campaigning for consumers in communications: a consultation", *Submission to the Australian Communications Consumer Action Network*, online at: <<http://www.privacy.org.au/Papers/ACCAN-0910.pdf>>

The Privacy Act

The principles of responsive regulation were endorsed under former Privacy Commissioner Malcolm Crompton (1999-2004). There have been criticisms more recently, however, over implementation of a responsive regulatory approach with too much emphasis on activity at the bottom of the pyramid and neglect of the top.

In fact, Greenleaf et al (2007) argue that the OPC is "*a failure at implementing responsive regulation*" and that "*the apex of its pyramid of enforcement has lost credibility because it simply does not use it.*" They cite the fact that the Commissioner has never sought or even threatened to obtain an injunction, thereby surrendering its effectiveness as a tool in the upper levels of the regulatory pyramid. They also cite

Braithwaite's comment that "*one test of responsive regulation is how good a system it is in 'bubbling up' stories of its successes and failures*", pointing out that no such stories have been published in the life of the Commissioner. Based on these observations, Greenleaf et al, in their submission to the Australian Law Reform Commission's (ALRC) 2007 review of the Privacy Act, state that any reforms to the Privacy Act must improve their responsiveness as regulators, lest they be a waste of time. The Australian Privacy Foundation, among others, agrees with this conclusion.

For more information

Australian Privacy Foundation (2009) "Digital Economy Future Directions: Consultation Draft Paper", *submission to the Department of Broadband, Communications and the Digital Economy*, online at:
<<http://www.privacy.org.au/Papers/DBCDE-DigEcon-0902.pdf>>

Greenleaf, G, Waters, N. and L. Bygrave (2007) "Implementing Privacy Principles: After 20 Years, It's Time to Enforce the Privacy Act", online at:
<<http://www.austlii.edu.au/au/journals/UNSWLRS/2007/31.html#fnB82>>

Waters, N. and G. Greenleaf (2008) "Meeting Privacy Challenges – the ALRC and NSLRC Privacy Reviews", *Cyberspace Law and Policy Centre*, online at:
<http://www.bakercyberlawcentre.org/ipp/events/symposium08/materials/2_Waters_Paper.pdf>

INTERNATIONAL EXAMPLES

BRITAIN

The Hampton Review (2005): “Reducing Administrative Burdens: Effective Inspection and Enforcement”

The Hampton Review led to the creation of the [Better Regulation Executive](#), which aims to reduce administrative burdens on business whilst still holding government departments and regulators to account. (Lord 2009). The Review also led to the creation of the Regulators Compliance Code (2007).

In the his Executive Summary, Hampton acknowledged the positive components of the UK government’s existing regulatory system but highlighted 6 problem areas, 2 of which are especially relevant to the field of responsive regulation:

- *regulators lack effective tools⁶ to punish persistent offenders and reward compliant behaviour by business;*
- *the structure of regulations, particularly at [a] local level, is complex, prevents joining up, and discourages business-responsive behaviour;*

Hampton promoted New Zealand’s Workplace Health and Safety Strategy, which makes reference to regulatory approaches which embrace responsiveness and which address motivational posturing in their compliance-building strategies:

“...we need to ensure that regulators use a flexible approach to intervention, depending on the motivations and responses of individual employers.” (p.26)

Further, the Review acknowledged that the gradual adoption of more responsive regulation has led to a general acceptance among business and regulators that inspections are inefficient in low-risk/high performing businesses and that risk assessments should instead inform the work programmes of inspectorates. It cites documents such as the Environment Agency’s *Delivering for the environment*, and the Health and Safety Commission’s *A strategy for workplace health and safety to 2010 and beyond* as examples of where the case for a more risk-based approach has been strongly made (p.27). The Review recommends that all regulatory agencies should adopt such an approach, on grounds that it provides an effective framework which enables regulators to relate their enforcement activities to the achievement of objectives, it ensures resources are targeted in a manner that prioritises the highest risks and it helps to evaluate new regulatory challenges and risks.

For more information:

Baldwin, R and J. Black (2008) “Really Responsive Regulation”, *The Modern Law Review*, 71(1) 59-94, online at: < <http://www3.interscience.wiley.com/cgi-bin/fulltext/119394476/PDFSTART>>

⁶ i.e. insufficient levels in the regulatory pyramid

Better Regulation Executive (2007) “Regulators’ Compliance Code: Statutory Code of Practice for Regulators”, *Department for Business Enterprise & Regulatory Reform*, online at: <<http://www.berr.gov.uk/files/file45019.pdf>>

Hampton, P. (2005) “Reducing administrative burdens: effective inspection and enforcement”, *HM Treasury*, online at: <www.berr.gov.uk/files/file22988.pdf>

Lord, V. (2009) “The Hampton and Macrory Reviews: A Summary”, *The Kingsley Napley Regulatory Law Update*, online at: <[http://www.kingsleynapley.co.uk/assets/files/newsletters/2229v06_KN_Regulator_AUGHR%20\(2\).pdf](http://www.kingsleynapley.co.uk/assets/files/newsletters/2229v06_KN_Regulator_AUGHR%20(2).pdf)>

Better Regulation Executive (2006) “Regulatory Justice: Sanctioning in a post-Hampton World”, London: Cabinet Office, <www.berr.gov.uk/files/file45183.pdf>

The Macrory Review (2006): “Regulatory Justice: Making Sanctions Effective”

The Hampton Review recommended that the Better Regulation Executive (BRE) should undertake a comprehensive review of regulators’ penalty regimes. Accordingly, the BRE established a Penalties Review, under the guidance of Professor Richard Macrory. The Penalties Review findings were the basis for the recommendations outlined in the Macrory Review (BRE 2006). It should also be mentioned that this review forms part of a wider government agenda on improving regulation, which includes the implementation of the aforementioned Hampton recommendations and the work of the Better Regulation Task Force as outlined in their 2005 report – “Regulation – Less is More: Reducing Burdens, Improving Outcomes.”

The Macrory Review outlines strategies for improving compliance among UK businesses. The recommendations call for an increase in the number and variety of sanctions, below that of criminal prosecution, as a means of enabling regulators to deal effectively with non-compliance in cases where criminal prosecution is not warranted. This multi-tiered approach is grounded in an overall strategy, referred to numerous by Macrory, to improve the responsiveness of the regulatory system. Macrory also recommends that pilot schemes to promote restorative justice for regulatory non-compliance be established. The Macrory Recommendations subsequently helped form the basis of the Regulatory Enforcement and Sanctions Act, Part 3 - which is discussed after this section (Lord 2009)

Macrory concludes his review with the following remarks:

“The reforms suggested by this review are not intended to transform sanctioning systems overnight, but to bring into them the flexibility, efficiencies and responsiveness that can facilitate the full implementation of the Hampton agenda. This will result in better deterrence options for regulators, better compliance for business and better outcomes for the public.” (p.9)

“These proposals are not about making it easier to penalise businesses but to create a system of sanctions that is more responsive and proportionate to the nature of the non-compliance.”(p.47)

Principle 3 of his recommendations is to pursue ‘Responsive Sanctioning’, that is:
“A sanction should be responsive and consider what is appropriate for the particular offender and the regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction.” (p.30)

Under his section on ‘The Role and Importance of Sanctions within the Regulatory System’, Macrory discusses the “limited range of enforcement tools” available to regulators:

“Over the course of my review, I have received evidence and submissions from many stakeholders including regulators, businesses, academics and many others that have supported my view that regulators have a limited range of enforcement sanctions within their toolkits.” (p.17)

This is a view shared by the Department of Environment, Food and Rural Affairs:
“DEFRA supports the widely held view, espoused also in Hampton, that the current system is not sufficiently responsive, targeted and sensitive to ensure that appropriate penalties are applied in all cases. To this end, the department accepts that there is room for improvement but restates its basic tenet that a robust penalties framework should encompass different types and levels of sanctions depending on the nature, frequency and seriousness of non-compliance.” (p.18)

Macrory also discusses why a greater number of enforcement tools and compliance strategies is necessary:

“Criminal prosecutions remain the primary formal sanction available to most regulators. While this sanction is appropriate in many cases, the time, expense, moral condemnation and criminal record involved may not be appropriate for all breaches of regulatory obligations and is burdensome to both the regulator and business. While the most serious offences merit criminal prosecution, it may not be an appropriate route in achieving a change in behaviour and improving outcomes for a large number of businesses where the non-compliance is not truly criminal in its intention.” (p.18)

For more information

Better Regulation Executive (2006) “Regulatory Justice: Sanctioning in a post-Hampton World”, London: Cabinet Office, online at:
< <http://www.berr.gov.uk/files/file45183.pdf>>

Better Regulation Taskforce (2005) “Regulation – Less is More: Reducing Burdens, Improving Outcomes”, a Report to the Prime Minister: Executive Summary`, online at:
<http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/lessismore_exec_summary.pdf>

Department for Business Innovation & Skills (BIS) “Improving Compliance among Businesses (Macrory Review)”, online at:
<<http://www.berr.gov.uk/whatwedo/bre/reviewing-regulation/compliance-businesses/page44102.html>>

Lord, V. (2009) “The Hampton and Macrory Reviews: A Summary”, *The Kingsley Napley Regulatory Law Update*, online at:
<[http://www.kingsleynapley.co.uk/assets/files/newsletters/2229v06_KN_Regulator_AUGHR%20\(2\).pdf](http://www.kingsleynapley.co.uk/assets/files/newsletters/2229v06_KN_Regulator_AUGHR%20(2).pdf)>

Macrory, R. (2006) “Regulatory Justice: Making Sanctions Effective”, London: Cabinet Office, online at: <www.berr.gov.uk/files/file44593.pdf>

The UK Office of Communications (Ofcom)

Ofcom states that it aims to be “*as transparent and objective as possible*” when selecting the most appropriate regulatory approach. It has developed a “*continuum of approaches*” from, “*no regulation at all, through industry self-regulation, co-regulation, to full statutory intervention*,” stating that “*no one form of regulation can successfully regulate all the various types of behaviour and activities going on within the communications sector.*” It is their preference to “*work in partnership with stakeholders to develop regulation*,” recognising that “*self- and co- regulation can, in the right circumstances, provide an effective means to address citizens’ and consumers’ interests.*” They also highlight that: “*the fast moving and technologically complex nature of the communications markets can...under some circumstances, make statutory regulation insufficiently flexible.*”

In applying their regulatory principles, Ofcom seeks to “*adopt a pragmatic and flexible approach...and take additional factors into account as appropriate to a specific case.*” Finally, it is their policy to “*consult publicly on any proposals for changes in regulation....and...include impact assessments of different options in [their] consultations,*” all of which, when applied, are elements of regulatory responsiveness.

For more information:

Ofcom (2008) “Initial assessments of when to adopt self- or co- regulation”, *Consultation Paper*, online at:
<<http://www.itu.int/ituweblogs/treg/content/binary/condoc.pdf>>

Ofcom, “Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation: Executive Summary”, online at:
<<http://www.ofcom.org.uk/consult/condocs/coregulation/statement/>>

The Regulatory Enforcement & Sanctions Act (RESA) 2008

As a result of the Macrory recommendations, Part 3 of the RESA provides regulators with new civil sanctioning powers to complement the existing criminal sanctions, as a means of better enforcing compliance across regulated businesses. It aims to provide “*flexibility to regulators when dealing with businesses whose conduct falls short of the standards required of them. The range of sanctions gives regulators the ability to respond on a case by case basis, allowing the application of appropriate sanctions for minor breaches, whilst retaining the ability to prosecute major breaches in the*

criminal courts.” In this way, the Act is an example of where the regulatory pyramid has been expanded to include a wider range of enforcement and compliance tools.

For more information:

Hill, N. (2009) “RESA 2008: An overview of Part 3”, *The Kingsley Napley Regulatory Law Update*, online at:

<[http://www.kingsleynapley.co.uk/assets/files/newsletters/2229v06_KN_Regulator_AUGHR%20\(2\).pdf](http://www.kingsleynapley.co.uk/assets/files/newsletters/2229v06_KN_Regulator_AUGHR%20(2).pdf)>

CANADA

Ontario Securities Commission (OSC)

The OSC is the largest securities regulator in Canada, with a vision statement as follows:

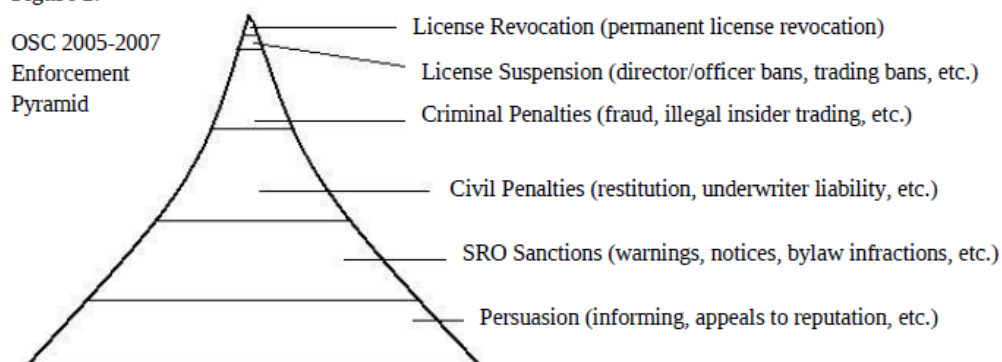
“To be an effective and responsive securities regulator – fostering a culture of integrity and compliance and instilling investor confidence in the capital markets.”

http://www.osc.gov.on.ca/static/_/AnnualReports/2009/chair_mesg.html

In their 2008 report, the need to “identify the important issues and deal with them in a timely way” is expressed clearly under “Goal 1: Responsive regulation.” According to Marquis: “the mention of “responsive regulation” in this section of the report may be coincidental, but the language contained within it--*proportionate and timely reaction to industry behaviour, possession of a range of tools*-- appears to conform with Ayres and Braithwaite's model of responsive regulation.”

Based on study of the OSC’s regulatory responses, Marquis proposes the following regulatory pyramid as a model for their operations:

Figure 2:



Recent analysis of the Commission's enforcement activity suggests that it conforms closely to the “enforcement pyramid” model (Marquis, 2009). Severe sanctions are used only very occasionally while intermediate sanctions occupy a larger scope of OSC's activity. According to OSC Chair David Wilson, the majority of the OSC’s activity is concentrated at the pyramid’s base, that is, it focuses on persuasion and “softer” means of securing compliance.

The Commission has a wide range of enforcement tools (including license revocation, officer bans, cease trading orders, onerous reporting requirements and various civil and criminal sanctions) at its disposal. However, it seldom uses its higher-level enforcement tools, thereby attenuating its reputation and rendering ineffective its capacity to responsively escalate sanctions in the event of non-compliance.

As Marquis (2009) puts it: *“It has been observed, in a number of cases, that the OSC has failed to successfully apply serious sanctions to big (and very public) offenders. We can safely assume that the regulated players within the Commission's jurisdiction understand this history, including the particular political and legal dynamics the regulator operates in.”*

For more info:

Marquis, K. (2009) “Responsive Securities Regulation: An Assessment of the Enforcement Practices of the Ontario Securities Commission”, *Regulatory Governance Initiative Working Paper*, Ottawa, ON: Carleton University, online at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1532366>

Ontario Securities Commission, “2008 Annual Report: Goal 1 Responsive Regulation”, online at: <http://www.osc.gov.on.ca/static/_/AnnualReports/2008/goal1.html>

Nova Scotia’s Environmental Compliance Model

According to the Nova Scotia Department of Environment and Labour, their Environment Act and its regulations are aimed at achieving a: *“responsive, effective, fair, timely and efficient administrative and regulatory system”* to protect the environment.

Reflecting elements of the Regulatory Pyramid, their monitoring and compliance division embraces 3 core principles – education, inspection and enforcement. In 2002, the department’s compliance model was improved to include a greater emphasis on cooperative/self- regulation, e.g.

- *delivering an education program to help the public and businesses comply with all environmental laws more easily.*
- *creating a Web-based plain-language guide to compliance and enforcement under the Environment Act*
- *formulating an operational policy guide that gives inspectors a clear description of the tools available to them, including non-punitive or voluntary means, to promote compliance with the law.*

These changes are part of a government-wide “better regulation” initiative which is being pursued in the form of a “Regulatory Management Policy”. The policy is aimed at achieving enforcement by operating predominantly at the base of the regulatory pyramid (i.e. education and persuasion) but also ensuring that regulators know when and how to escalate their approach if necessary.

According to the government, the “essence” of this policy is to:

- *consider carefully when to intervene,*
- *do it only when the benefits justify the costs,*
- *leave a light footprint when it does get involved, and*
- *ensure the benefits and protection of regulation are maintained or improved.*

They also highlight the importance of education in any effective regulatory approach: *“It's not enough to create - or even communicate - a new policy. As with any new regulation, the regulator has a responsibility to ensure those affected are aware and understand what it means to them. That's why [our] policy is supported by training and a plain language guide with more information on implementing it.”*

For more information:

Government of Nova Scotia:

“Better Regulation: Competitiveness and Compliance Initiative Strategy” (CCI), online at: <<http://www.gov.ns.ca/nse/cci/>>

“Nova Scotia Environment and Labour’s Competitiveness and Compliance Initiative Strategy: 2005/06 – 2009/10”, online at:

<<http://gov.ns.ca/betterregulation/pdf/StrategyFINLoRes.pdf>>

“Improving Regulatory Quality”, online at

<<http://www.gov.ns.ca/betterregulation/action/improving.html>>

“Regulatory Management Policy Guide”, online at:

<<http://www.gov.ns.ca/betterregulation/pdf/Reg-Mgmt-Policy-Guide-PDF.pdf>>

Nova Scotia Department of Environment and Labour:

“The Environmental Compliance Model”, online at:

<<http://www.gov.ns.ca/nse/cci/docs/CCIEMCFactsheet.pdf>>

Further information about Canada and Responsive Regulation

Treasury Board of Canada (1993) “Responsive regulation in Canada”, *presented to the Sub-committee on Regulations and Competitiveness, Standing Committee on Finance, House of Commons*, Ottawa: Government of Canada.

INDONESIA

Indonesian Ministry of Finance

The Ministry emphasises the importance of building voluntary compliance in taxpayers. In this vein, their Offices, through education programs, help taxpayers understand their rights and obligations under the tax laws. They stress the importance of balancing service and enforcement but acknowledge that regulation must be responsive and as such the service-enforcement balance will fluctuate in response to the inevitable differences in risk profiles presented by taxpayers.

The Ministry’s Compliance Strategy also reflects elements of responsiveness, in that they seek to first build compliance at the bottom levels of the regulatory pyramid (Pakpahan). Their strategy includes the following:

- Provide a wide range of informative tax publications and campaigns
- Conduct various active tax education programs

- Make early contact with taxpayers who have failed to submit returns or pay tax
- Introduce improved risk analysis across the region
- Work on non-lodgement returns and trace taxpayers with whom contact has been lost
- To ensure correct disclosure, crosscheck third party information with our database
- Build closer relationships through industry associations and tax professionals and agents

For more information

Pakpahan, R. "Tax Administration Strategies to Respond to Small and Medium Enterprises: Case of Indonesia", *Ministry of Finance, the Republic of Indonesia*, online at:

<<http://www.itdweb.org/SMEconference/documents/parallel/1B%20Pakpahan%20INDONESIA%20ppt%20ENG.pdf>>

NEW ZEALAND

New Zealand Advertising Standards Authority

The guiding philosophy of the New Zealand Advertising Standards Authority is self-regulation (ANZA 2008).

According to the Association of New Zealand Advertisers (2008):

"The ASA regime is a good example of Responsive Regulation in action. A good aim for regulation is to achieve the desired regulatory response in the most cost effective, timely and efficient manner. The theory of Responsive Regulation, as devised by Ayres and Braithwaite...is based on the premise that "persuasion is cheap and punishment is expensive." The ASA regime uses persuasion techniques in a very sophisticated manner to achieve a cost-effective, timely and efficient regulatory regime which protects and empowers consumers."

And Harker et al (2005) state that...

"...[The ASA] system of advertising self-regulation has evolved in line with the 'responsive regulation philosophy provided so articulately by Ayres and Braithwaite... the ASA regulators certainly persuade rather than punish overtly... a soft, consultative tone is used to achieve compliance; this is a method of regulation to which industry responds favourably and thus other stakeholders also achieve their objectives. So, enforcement of decisions, which is paramount to the success of any regulatory scheme, is achieved at the ASA with a big stick used sparingly and quietly."

According to ASA, it has chosen the self/responsive-regulatory approach for the following reasons:

- *"Self-regulation can operate much faster than other forms of regulation"* - up to 3 times faster, according to research conducted by the Foundation for Advertising Research (FAR)

- Use of the '*balance of probabilities*' rather than '*beyond reasonable doubt*' approach (as in the prosecution system) means there is a lower threshold of proof required to uphold a complaint and therefore greater pressure on advertisers to comply under a self-regulatory system
- "*A substantial benefit of self-regulation is its flexibility, which enables it to respond quickly to changed circumstances.*"
- The advertising codes include an obligation to "*observe a high standard of social responsibility*" when advertising to children. This could not be enacted in law, which requires greater precision than a self-regulatory code.
- Self-regulation allows for greater government monitoring and constructive information exchange

For more information:

ANZA (2008) *A Guide to Self-Regulation of Advertising in New Zealand*, online at: http://www.anza.co.nz/files/anza/Guide%20to%20Self%20Regulation%20of%20Advertising%20in%20NZ_0.pdf

Harker, D., Wiggs, G. and M. Harker (2005) “Responsive Advertising Regulation: A Study from New Zealand”, *Australian Journal of Political Science*, 40(4): 1-14, online at: <http://www.ffar.org/PDFS/AJPS%20CAJP130227.pdf>

New Zealand Inland Revenue Department

According to Morris and Lonsdale (2005), Inland Revenue has developed a compliance model to:

“...assist in understanding the factors that influence taxpayer compliance behaviour, while enabling it to choose the most appropriate actions to achieve long-term compliance.”

The department acknowledges that their compliance model is:

“...based on a concept developed by the Australian National University and refined for the Australian Taxation Office (ATO). Similar models are used in other tax administrations. The model is a tool that helps us achieve the outcomes outlined in Inland Revenue’s Business Plan—The Way Forward.”

Their compliance model is illustrated in a pyramid (the same as that of the ATO) which has two components:

- 1) focusing on the customer’s attitudes and behaviours
- 2) focusing on the department’s response as a means of achieving compliance

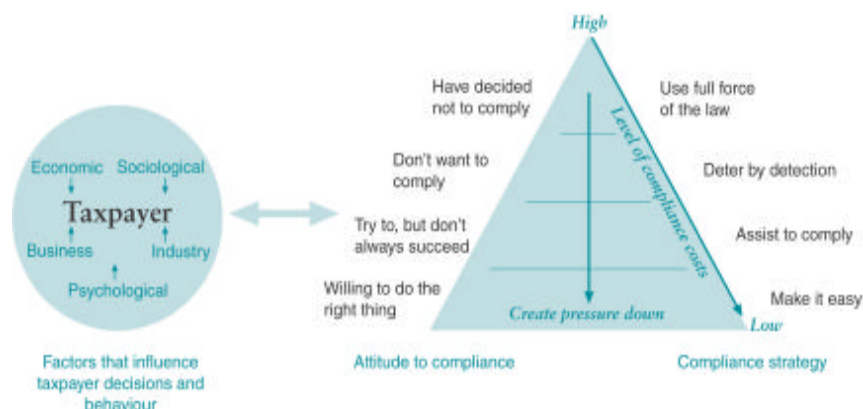


Figure A: Components of the Compliance Model

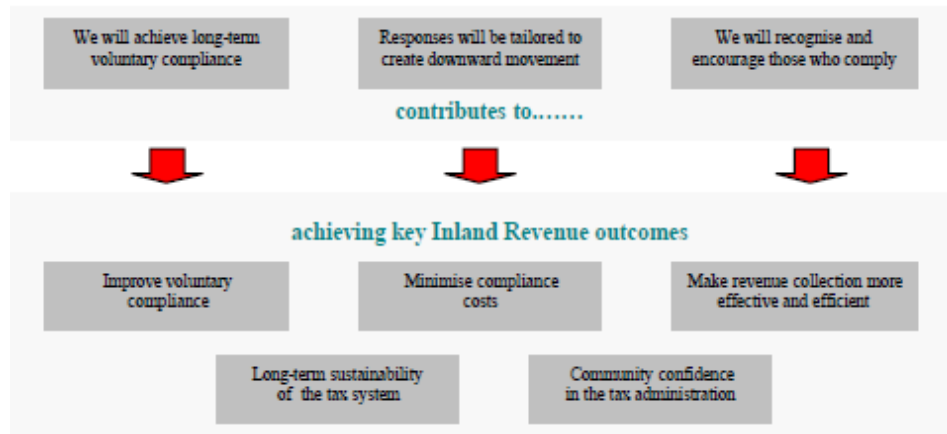
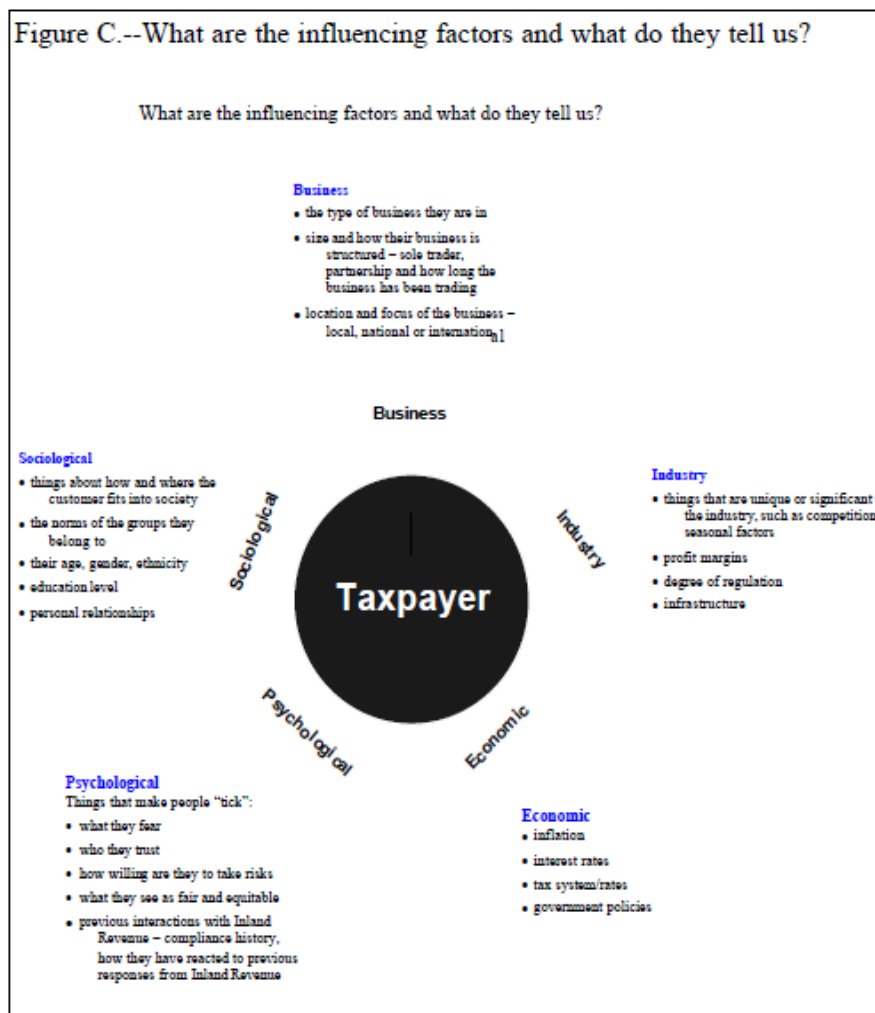


Figure B: Using the Compliance Model

The department's compliance model also includes an expanded version of the BISEP. Mentioned earlier under the ATO section, this is a tool for analysing the customer's reasons for behaving in a particular way.



For more information:

Copeland, V. (2005) "Research into the Impact of Audit on Compliance", in *Recent Research on Tax Administration and Compliance, proceedings of the 2005 IRS*

Research Conference, Washington, June 7-8, online at: <<http://www.irs.gov/pub/irs-soi/05copeland.pdf>>

Morris, T. and M. Lonsdale (2005) *Translating the Compliance Model into Practical Reality*, New Zealand Inland Revenue, online at: <<http://www.irs.gov/pub/irs-soi/04moori.pdf>>

New Zealand Liquor Sales

In 1998, the Alcohol and Public Health Research Unit (APHRU), funded by the New Zealand Health Research Council completed an investigation into the application of ‘responsive regulation’ theory to the Sale of Liquor Act 1989. The investigation’s findings prompted a series of recommendations, which contributed to the review and amendment of the Act.

In particular, it was recommended that responsive regulatory strategies be applied to the following aspects of the Act:

- the criteria and conditions under which each licence is granted,
- the right of objection by members of public to the grant or renewal of a licence, and
- the Liquor Licensing Authority’s powers of sanction.

According to the APHRU:

“The theoretical work [of Braithwaite and Ayres] and the example of its application to liquor licensing has significance for other areas of public health concern which are regulated through legislation.”

For more information:

Hill, L. and L. Stewart (1998) “Responsive Regulation & the Sale of Liquor in NZ”, *Alcohol & Public Health Research Unit*, online at: <<http://www.aphru.ac.nz/projects/responsive.htm>>

Hill, L. & L. Stewart (1998) "Responsive Regulation": Theory and the Sale of Liquor Act, *Social Policy Journal of New Zealand*, 11, 49-65

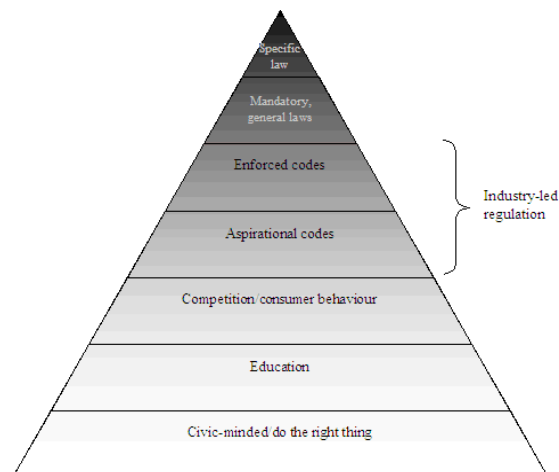
New Zealand Ministry of Consumer Affairs (MCA)

Subsequent to their review of New Zealand’s consumer protection laws, the MCA is recommending the need to adopt a more responsive approach to enforcement.

In their 2005 Discussion Paper on the ‘Review of Industry-Led Regulation’, they acknowledge the merits of using the regulatory pyramid:

“The regulatory environment can be modelled in terms of a pyramid showing the increasing level of intervention in a particular market. The pyramid also shows the extent to which regulation is binding on market participants.”

Pyramid presented in the MCA's 2005 Discussion Paper:



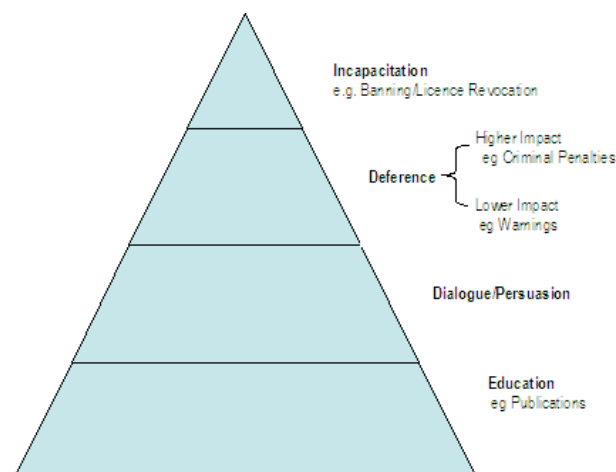
The Commission goes on to acknowledge the need for increased levels of enforcement:

“Compared with the range of sanctions available in similar legislation overseas, New Zealand's FTA [Fair Trade Commission] lacks a number of sanctions particularly those that are represented in the mid levels of the pyramid of responsive regulation.”

In recognition of this deficiency, the MCA's 2006 “Review of the Redress and Enforcement Provisions of Consumer Protection Law” emphasises the need for New Zealand's consumer protection law to better embrace a hierarchical regulatory strategy (as presented in the regulatory pyramid) where there is greater capacity for escalation and a greater range of sanctions in the event of non-compliance:

“According to the pyramid theory of responsive regulation, compliance is best secured by the use of persuasion and negotiation techniques. To be effective, however, these techniques have to be supported by a range of escalating sanctions which can be applied or used depending upon the level of cooperation by the business and the seriousness of the contravention. When a range of sanctions is available, lower level enforcement measures are more effective. The threat of more severe forms of punishment encourages businesses to comply.”

They illustrate this approach with a further pyramid:



Although little evidence of any concrete application of a responsive regulatory approach is yet available, the Commission's recommendations highlight a growing recognition of the importance of a responsive approach in ensuring compliance with consumer protection legislation.

For more information

Ministry of Consumer Affairs (2006) "Review of the Redress and Enforcement Provisions of Consumer Protection Law", *International Comparison Discussion Paper*, New Zealand Ministry of Economic Development, online at: http://www.consumeraffairs.govt.nz/policylawresearch/enforcement-review/paper-two/paper-two-02.html#P31_5941

Ministry of Consumer Affairs (2005) "Review of Industry-Led Regulation", *Discussion Paper*, New Zealand Ministry of Economic Development, online at: Part 1: http://www.consumeraffairs.govt.nz/policylawresearch/industry-led-regulation/discussion/discussion-03.html#P120_16097
Part 2: http://www.consumeraffairs.govt.nz/policylawresearch/enforcement-review/paper-two/paper-two-05.html#LOC_P294_40175

Workplace Health and Safety

New Zealand's 'Workplace Health and Safety Strategy to 2015' sets out principles for an effective regulatory system for WHS, focusing on the need for a responsive approach:

"Persuasion by the regulator combined with an underlying threat of punishment will be enough to ensure compliance by most other employers. Stronger enforcement actions will be required, however, for businesses that purposefully breach the law. Regulators must target the worst offenders and eliminate their negative influence on the rest of the business community. This will help lift standards across the board and provide a stronger culture of compliance."

And it recommends that:

"...regulators use a flexible approach to intervention, depending on the motivations and responses of individual employers."

For more information:

"Approaches to Intervention to Improve Workplace Health and Safety", online at: www.whss.govt.nz/resources/ApproachesInterventionAugust2004.pdf

Workplace Health and Safety Strategy for New Zealand to 2015:
<http://www.whss.govt.nz/>

The European Union

REACH: Chemical Regulation Policy

The core component of REACH (Registration, Evaluation, Authorisation and restriction of Chemicals) is the requirement that manufacturers or importers of chemicals sold in the EU register them with a central European Chemicals Agency, to

ensure that all risk-related information can be made publicly available. In the absence of registration, the manufacture and sale of the chemicals will be prohibited. In other words: “no data, no market”.

This new approach means that all major responsibility is placed with business rather than administrative bodies. That is not to say it is not done in a demanding manner. In fact the requirements are highly rigorous with producers obliged to collect and provide information about the entire production chain of the chemical and to reduce risks at every stage of production, should they wish to sell it.

Fuhr and Bizer argue that:

“...REACH is nothing less than a paradigm shift in the regulatory approach of the EU...The REACH proposal is bringing about a paradigm shift towards self-responsibility of agents and responsive regulation.” This is because, unlike mandatory regulation’s assumption that regulatees will follow state-directed command-and-control policies, the starting point of REACH’s approach is the self-interest of the involved parties – that is, it imposes self-responsibility on manufacturers and makes them liable for any damages. As Fuhr and Bizer (2007) put it: *“The “carrots and sticks” approach, characteristic [of] responsive regulation, is applied by REACH to the regulation of chemicals.”* There are, however, weaknesses in this approach. Specifically, Fuhr and Bizer (2007) argue that there is a need for greater incentives to support the self-responsibility regulative approach, should the initiative wish to achieve widespread participation and compliance.

For more information:

Health and Safety Executive, “REACH”, UK Government, online at:
<<http://www.hse.gov.uk/reach/>>

European Commission, “REACH”, online at:
<http://ec.europa.eu/environment/chemicals/reach/reach_intro.htm>

Fuhr, M. and K. Bizer, 2007, [“REACH as a paradigm shift in chemical policy – responsive regulation and behavioural models”](#), *Journal of Cleaner Production*, 15(4): 327-334.

THE NETHERLANDS

Dutch Food and Consumer Product Safety Authority

Mascini and Van Wijk refer to the widespread use of responsive regulation in Netherlands, pointing to the embrace of the approach by the Dutch tax office, labor inspectorate and environmental inspection agency (p.27).

However, in their 2009 article on The Netherlands’ Food and Consumer Product Safety Authority, the authors identify a series of obstacles to regulating responsively: *“First, it is not always clear which enforcement style should be utilized because inspectors apply enforcement styles inconsistently. Second...inspectors may not succeed in applying the most suitable style. They can encounter language barriers or ambiguous or rigid rules, or the application of the most apt style can interfere with achieving higher priority goals. Third, it is clear that negative unintended*

consequences are not restricted to businesses targeted for a deterrent approach by inspectors. They often occur even when inspectors wish to act persuasively because regulatees tend to perceive their behavior as more coercive than intended by inspectors.”

The authors argue that these difficulties are not restricted to their case-study but highlight an underlying problem with the applicability of responsive regulation theory.

For more information:

Mascini, P. and E. Van Wijk (2009) “Responsive regulation at the Dutch Food and Consumer Product Safety Authority: An empirical assessment of assumptions underlying the theory”, *Regulation & Governance*, (2009) 3, pp.27-47, online at: <<http://www3.interscience.wiley.com/cgi-bin/fulltext/122310190/PDFSTART>>

The Table of Eleven

In an effort to improve “compliance friendliness”, the Dutch Ministry of Justice and Erasmus University pioneered the development of the “Table of Eleven” key determinants of compliance. This is used to both guide reviews of compliance and enforcement relating to existing legislation and it is also used as an analytical tool in the development of new regulation. The table is structured in a way similar to the regulatory pyramid, with three distinct levels:

1. Spontaneous compliance dimensions – these are factors which affect the incidence of voluntary compliance, that is, compliance which would occur in the absence of enforcement (including level of knowledge and understanding of the rules, benefits and costs of complying, level of acceptance of the reasonableness of the regulations, general attitudes to compliance by the target group and “informal control”)
2. Control dimensions – these determine the probability of detection of non-complying behaviour (for example by third parties, inspectors)
3. Sanctions dimensions – this is the expected value of sanctions for non-compliance, that is the probability of a sanction being imposed where non-compliance is detected and the severity and type of likely sanctions

For more info

Jacobs, S.H. (1999) “Regulatory Reform in the Netherlands”, OECD.

OECD (2009) “Better Regulation in the Netherlands”, *OECD*, online at: <<http://www.oecd.org/dataoecd/0/13/43307757.pdf>>

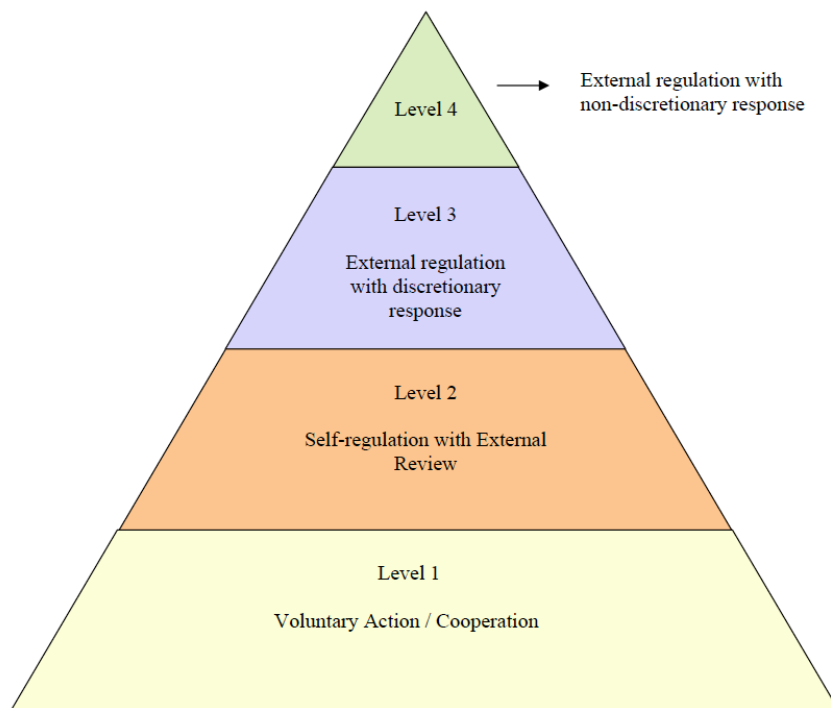
OECD (2002) “Regulatory Policies in OECD Countries: from Interventionism to Regulatory Governance”, *OECD*, online at: <[http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/BRG_Toolsimproveexistingreg_Other7/\\$FILE/7.RegulatoryPoliciesOECDCountries.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/BRG_Toolsimproveexistingreg_Other7/$FILE/7.RegulatoryPoliciesOECDCountries.pdf)> (chapter 5, p.79)

THE UNITED STATES

Oregon Patient Safety Commission

In 2009, the Oregon Patient Safety Commission was asked by the Senate Health Care Committee, to form a working group to offer recommendations for enhancing nursing home quality. Of the six core recommendations made, the working group's first recommendation was *"to develop models and concepts that encourage responsive regulation by the state and independent quality improvement action by nursing homes."*

As part of this recommendation, the working group developed the following regulatory pyramid.



The pyramid, it is stated, is based on a series of assumptions, including

- An emphasis on learning rather than blaming cultures
- A belief in open and frank information sharing
- An assertion that punishment is more effective when persuasion is attempted first and the recognition that all stakeholder actions must commence (where possible) at the base of the pyramid
- A belief that quality improvement requires that both public and private actions be applied and reinforced in a consistent approach and that single, isolated actions are seldom sufficient
- That there is a need for real and immediate escalation should persuasion or voluntary actions fail

For more information:

Oregon Patient Safety Commission (2010) "Report of the Nursing Home Quality and Regulation Work Group", July 6, Draft Only.

